

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 6073

CHARLES W. BRITT, JR.,

Petitioner

versus

STATE OF NORTH CAROLINA,

Respondent

INDEX

IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION,
CRAVEN COUNTY, NORTH CAROLINA, STATE OF NORTH CAROLINA VS.
CHARLES W. BRITT, JR., 69 Cr 2387

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THE GENERAL COURT OF JUSTICE SUPERIOR COURT File and Docket No. 69-CR-2387
County of Craven CRIMINAL DOCKET Film No. 69-13-141

Prosecuting Attorneys State Witnesses Offense STATE VS.
Luther Hamilton, Jr. Deborah Ann Humphrey Murder Charles W. Britt, Jr.
H-85 Craven Terrace P M Bratcher Amount and Name Ethel J Best

Defendant's Attorneys of Sureties on Defendant's Bond \$2000—
Troy Smith—Best Ethel Best.
John C Monroe

Date	Docket Entries	Film No.
4-7-69	Coroner's Inquest	69-8-954
4-7-69	Appearance Bond—Ethel J. Best—\$2000.00—John C. Monroe, Atty in Fact	69-8-965
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5-26-69	Sub-Grand Jury	
6-3-69	Sub.	
5-6-69	Affidavit of Indigency—Ethel Best	69-8-1372
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6-3-69	Affidavit of Indigency—Britt	69-9-745
6-3-69	Order Appoint Legal Counsel—R. G. Bowers & Lamar Sledge	69-9-744
9-8-69	Sub.	
8-9-69	Order (Petition) Comit Britt Cherry Hosp not exceed 60 Days	69-11-281

Date	Docket Entries	Film No.
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11-10-69	Sub.	
11-14-69	Jury	69-12-951
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NORTH CAROLINA COURT OF APPEALS

Spring Session 1970

STATE OF NORTH CAROLINA

v

CHARLES W. BRITT, JR.

} *From Craven*

Before FOUNTAIN, J., December 18, 1969 Session of Craven Superior Court. DEFENDANT Appealed. (Filed C.A. March 16, 1970)

STIPULATION

The State and defendant through their respective counsel of record hereby stipulate and agree that upon the trial of the above entitled cause the court was properly organized and that the parties were duly before the court; that a true bill of indictment was duly returned by the Craven County Grand Jury in open court charging defendant with the felony of murder; and that thereafter defendant was duly arraigned, twice.

This 13th day of March, 1970:

ROBERT G. BOWERS

Appointed Counsel for Defendant

P.O. Box 1394

New Bern, North Carolina 28560

E. LAMAR SLEDGE

Appointed Counsel for Defendant

New Bern, North Carolina 28560

and

LUTHER HAMILTON, JR.

Solicitor

Morehead City, North Carolina 28557

INDICTMENT—MURDER

No. 69 CR 2387

STATE OF NORTH CAROLINA
 IN THE GENERAL COURT OF JUSTICE—
 SUPERIOR COURT DIVISION
 COUNTY OF CRAVEN

April 8th Session, 1969

THE STATE OF NORTH CAROLINA

v.

CHARLES W. BRITT, JR. and
 ETHEL J. BEST

Defendant

INDICTMENT—
 MURDER

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Charles W. Britt, Jr. and Ethel J. Best late of the county of Craven on the 24th day of March 1969, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Jannie Banks contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

LUTHER HAMILTON, JR.
Solicitor

WITNESSES:

X DEBRAH ANN HUMPHREY
 W. D. Dowdy, III
 X P. M. BRATCHER

Those marked are sworn by the undersigned foreman, and examined before the grand jury, and this bill found to be A True Bill.

FRED H. MILLER, A.P.S.
Foreman Grand Jury

AFFIDAVIT OF INDIGENCY

1. By whom are you employed? No
2. What is your present income? No

3. Are you married? No
4. How many children under age 18 do you have? No
5. What kind of car do you own? None
6. Is it paid for? If not, what are the payments?
7. State specifically all property which you own and give location and its value.
8. State specifically all property which you and your spouse own jointly and give location and its value.
9. How much do you owe? \$110.00

I hereby declare under the penalties of perjury that the foregoing answers are true, correct, and complete and that I am financially unable to employ counsel to represent me in this action. I hereby request the court to appoint counsel to represent me in this action.

This the 3 day of June, 1969.

CHARLES WILLIAM BRITT, JR.
Defendant

(Sworn to on June 3, 1969.)

**ORDER OF APPOINTMENT OF LEGAL COUNSEL
FOR INDIGENT DEFENDANT**

The defendant, Charles W. Britt, Jr. having been called to plead to the true bill of indictment found or warrants issued against him, wherein he is charged with Murder and it appearing to the undersigned judge presiding, from the affirmations made by the defendant and after due inquiry made, as appears in the record, that the defendant is unable by reason of his indigency to employ the services of counsel to represent him in this cause; it is,

ORDERED AND ADJUDGED that the defendant is an indigent and in need of the services of an attorney, as contemplated by law; and that Robert G. Bowers and Lamar Sledge, Attorneys at Law, are hereby appointed as counsel for the indigent defendant as is provided in GS 15-4.1 and GS 15-5.

This the 3 day of June, 1969.

ALBERT W. COWPER
Judge Presiding

PETITION FOR MENTAL EXAMINATION

COMES Now the defendant in the captioned cause, by and through his court appointed counsel, and moves for his commitment to a State Hospital for observation with respect to his mental competency as provided by statute.

The petitioner shows to the court that he and another are charged under indictment in this cause with having committed on or about March 24, 1969, the capital felony of murder.

Petitioner further shows to the court that, upon his affidavit of indigency, counsel for petitioner were appointed on June 3, 1969 by order of the Honorable Albert W. Cowper, Judge presiding at the June Session of the Superior Court of Craven County.

In support thereof, petitioner shows to the court that he was committed in 1962 at about the age of 14 to the O'Berry Training School, a State Institution, and on information and belief court appointed counsel for petitioner aver that the records of said institution reflect a less than average level of mental capacity on the part of petitioner, who was born on June 21, 1948.

And further in support thereof, petitioner and his counsel show to the court that it appears to be generally accepted and acknowledged among various law enforcement officers and members of the bar of Craven County who have observed the petitioner and have had personal contact with him that the petitioner suffers to an undetermined extent from some mental deficiency, defect, disease, or abnormality.

WHEREFORE, petitioner prays the court to issue an order committing him to a State Hospital for observation and treatment, and for report as to his competency in accord with applicable statutes of this State.

This ... day of July, 1969.

ROBERT G. BOWERS
E. LAMAR SLEDGE
Counsel for Petitioner

ORDER OF COMMITMENT TO CHERRY HOSPITAL

IT APPEARING to the court that the defendant in the captioned cause, together with another person, is charged by

indictment with having committed the capital felony of murder on or about March 24, 1969;

And it appearing to the court, upon representations made that the defendant may be of unsound mind, that inquiry should be made into the defendant's mental condition;

And it further appearing to the court that prior to his present incarceration the defendant resided with his mother, Mrs. Lola Gibson, at her residence, Route 2, Box 74, New Bern, North Carolina;

Now, therefore, it is ORDERED that Charles William Britt, Jr. be and he is hereby committed to the Cherry Hospital at Goldsboro, North Carolina, as provided in Article II, Chapter 122 of the General Statutes of North Carolina, and applicable provisions of the laws of this State, for a period not exceeding sixty days for treatment, observation, examination, and report as to his competency to plead to the charges against him and as to his competency and mental condition.

It is further ORDERED that certified copies of this order and accompanying petition be furnished to the sheriff of Craven County and that he or one of his deputies is hereby directed to convey the order of this court and accompanying petition to officials of the said Cherry Hospital and to make such arrangements as may be necessary or appropriate for transportation of the defendant to said hospital for examination.

This 19 day of August, 1969.

GEORGE M. FOUNTAIN
Judge Presiding

REPORT OF STATE HOSPITAL—Discharge Summary

NORTH CAROLINA
DEPARTMENT OF MENTAL HEALTH

CHERRY HOSPITAL
GOLDSBORO, N. C.

Britt, Charles W., Jr.
Hospital #4 508 98
Clinical Summary
October 30, 1969

(CONFIDENTIAL AND PRIVILEGED—For professional purposes only. Not for publication. Not to be used against the patient's interests.)

A 21 year old single male on a pretrial observation order under GS 122-91, from the Superior Court of Craven County, dated 8-19-69, signed by the Honorable George M. Fountain, Judge Presiding. The charge is the felony of murder.

The family history shows that one sister had epilepsy and reportedly one cousin has been at a training center. Began school age 6, finished the 9th grade at 16, but this is somewhat hard to evaluate as he was taken out of school and sent to O'Berry Training School when in the 7th grade and also was in the Frederick Reform School at Petersburg, Va. in '67. It appears that there was significant retardation and there may be some error in the patient's statement because he admits he found it difficult to learn. Occupation has been cook and short order chef at the Little Mint in New Bern. There is no service record. Subject claims to have been classed 1-A but never called. Subject is single and claims to have 2 children but the family make no mention of this. Subject does suggest that the girl friend is involved in his present charge and it appears that she is the mother of these 2 children ages 4 and 2. Subject's health relates mostly to his mental retardation problem. He did have an operation for hernia in 1950 at age 2 which the parents give as the beginning of this intellectual problem, claiming that the child had a high fever and the doctor told them at the time that the boy would never be "mentally right." Around age 7 or 8 subject was hit on the head with a swing and was taken to the Sampson County Memorial Hospital emergency room and sent home. Subject's drinking habits are claimed by himself to have been heavy, especially when he would get worried but claims that more recently he has been drinking much more lightly. He states he never had DT's or other complications. Subject denies the use of drugs although admitted that he has smoked "refs" twice but did not like them. Difficulty with the law began about '62 at about age 14 when he was picked up on a B & E charge and this resulted in his going to O'Berry Center where he remained until sometime in '63 or '64. He was with the Job Corps in Tennessee in '66. Sometime in '67 he was at the Frederick Reformatory School at Petersburg, Va. but this may have been in re-

spect to a charge in '67 of interstate car larceny when he served 18 months of a 3 year sentence. Subject was paroled in 8-68. In 12-68 he was charged with truck larceny and given 60 days. The present offense took place in 4-69 when the grandmother of his girl friend was beaten and stabbed to death.

On admission here subject was noted to be a cooperative young male, showing no unusual appearance, behavior, or speech. He was alert and in good contact and well oriented. Hallucinations of any type at any time were denied and none were apparent. The IQ seemed to be no better than borderline and probably mildly defective. Memory appeared adequate and insight seemed reasonably good. Speech was normal, answers were appropriate, relevant, and adequate and subject was spontaneous. The content of thought showed no evidence of a thinking disorder, delusional material, or other abnormality. The affective reaction showed a feeling of persecution but no hostility directed toward the examiner or the hospital. He did say that everything always went wrong from New Bern and would until he got away from there. He showed no significant depression or suspicion. Subject states that he and his girl friend had visited the girl's grandmother earlier in the day of the alleged offense. The grandmother was later, probably the next morning, found beaten to death by a 13 year old neighbor girl. He and the girl friend were arrested because they had been at her place that day. They were later released and rearrested. He stated that his girl friend had testified that he left her place that night and came back all upset. He thinks she said this to protect herself and infers but does not actually state that he is innocent. There were no significant findings other than the mental retardation of some degree to be determined later.

During continuous observation on the ward this subject has shown no unusual behavior. He gets on well with the others and takes part in most ward activities with interest. In general he appears to be in a cheerful frame of mind. Psychological testing gave him an IQ of 76, indicating borderline intelligence. Subject cooperated well enough with considerable dramatic sighing and complaints about the tasks being so hard. He seemed relatively relaxed and

understood and communicated easily. Some anxiety was present in the records and there was a tendency to project and blame others for getting him into trouble associated with self pity. It seemed that he wanted affection and attention and has apparently been unable to satisfy these needs completely. There is nothing to suggest a break with reality and all problems appeared secondary to his limited intelligence. Skull x-ray was negative. Electroencephalogram (EEG, brain wave test) normal. When seen in final conference subject again discussed his stay at the O'Berry Training Center here and also at Petersburg, Va. in '67. He stated that his girl friend, who he said was out on \$2000 bond, had told on him. He stated that they were always "jacking me up" around New Bern. He said that certain people always have it in for you and every time anything happens they pick you up first, this, obviously, refers to the authorities. He stated that the alleged murder was said to have occurred March 25 and that he was not sent here until late in August. Careful examination revealed no findings other than limited intelligence. Subject understood his situation clearly and wished to be returned for trial.

DIAGNOSIS: MENTAL RETARDATION, BORDERLINE LEVEL.

DISPOSITION:

1. Return to court as able to stand trial.
2. It is the carefully considered opinion of the medical staff of this hospital that Charles Britt is able to plead to the bill of indictment against him. He knows right from wrong, is aware of the nature and probable consequences of the offense with which he is charged, and, in our opinion, is able to consult with counsel in the preparation of his defense.

E. C. FOWLER, M.D.
Clinical Director

BRUCE KYLES, M.D., F.A.P.A.
Assistant Superintendent

BK:ea

cc: CSC Craven County 3 copies (for CSC, solicitor, and defense attorney)

JURY, NOVEMBER 14, 1969

The jury consisted of the following:

- | | |
|------------------------|----------------------------|
| 1. Fred Ayers | 7. David Harold Latham |
| 2. Eula Hargett | 8. Mrs. A. E. Hassell, Jr. |
| 3. Mrs. U. B. Williams | 9. Bobby R. Reece |
| 4. Fred S. Nelson | 10. Beulah Howerin |
| 5. Ernest Thomas Smith | 11. Mrs. Mimie Collins |
| 6. Guy H. Avery | 12. Mrs. G. M. Pickard |
- Alt: Vera Clark White, Mrs. James Edw. Riggs

ORDER FOR MISTRIAL

The jury began deliberating at 9:30 a.m., and were kept together until shortly before one o'clock when they were excused for lunch and returned at two. About 2:15 the jury reported they were hopelessly deadlocked, whereupon the court instructed them as to their duty to agree on a verdict if they could do so in good conscience as appears in the record. The court, thereupon, requested the jury to return to the jury room and deliberate further which they did, and ten minutes after three o'clock the jury again reported that it is hopelessly deadlocked and there has been no change in the standing of the jury since ten o'clock this morning and each of the jurors in answer to the court's question has said or indicated by nodding their heads that it is their belief they cannot agree on a verdict. Upon the statements by each of the jurors to the effect that they cannot agree on a verdict the court finds as a fact that the jury cannot agree and the ends of justice require a juror be withdrawn and a mistrial ordered.

It is, therefore, ORDERED, that juror Number 1 be withdrawn and a mistrial ordered.

This 14th day of November, 1969.

GEORGE M. FOUNTAIN
Judge Presiding

MOTION FOR TRANSCRIPT OF TRIAL TESTIMONY

After first being duly sworn, Charles W. Britt, Jr., defendant herein, moves for an order requiring a transcript of the trial testimony.

I was arraigned and placed on trial on November 11, 1969, in the Superior Court Division of the General Court of Justice in Craven County for the capital crime of murder in the first degree. On November 14, 1969, after the case had been submitted to the jury and after the jury had reported a hopeless deadlock, the presiding judge declared a mistrial.

I have been advised by counsel that defendants who are not paupers secure transcripts in such cases which provide immeasurable assistance in securing a fair trial and due process. I am without the money to pay for such transcript and believe a transcript of the testimony to be an indispensable need for a fair and proper trial as required by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 11 of the Constitution of the State of North Carolina.

Dated: November 25, 1969.

CHARLES W. BRITT, JR.
Defendant.

(Sworn to on Nov. 25, 1969.)

MOTION FOR TRANSCRIPT

NOW COMES the defendant, Charles W. Britt, Jr., by his court appointed attorneys, E. Lamar Sledge and Robert G. Bowers, and respectfully move the court under the provisions of Article I, Section 11 of the Constitution of the State of North Carolina and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the opinions of the Supreme Court in *Griffin v. Illinois*, 351 US 12 (1956) for a transcript of the evidence and testimony at the expense of the State of North Carolina.

In support of such motion the defendant points out that a non-indigent defendant could purchase a transcript, and that the Supreme Court of the United States in *Griffin v. Illinois* on page 19 stated, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Following this decision the court has required the provision of free transcripts to indigents, see *Draper v. Washington*, 372 US 487 (1963); *Long v. District Court of Iowa*, 385 US 192 (1966) the apparent holding of

the Supreme Court of the United States is the state which prosecutes an indigent is commanded to furnish him every substantial litigation asset which a non-indigent defendant could buy, at least where it is practical for the State to do so at no costs other than a financial one.

This 25th day of November, 1969.

E. LAMAR SLEDGE

ROBERT G. BOWERS

*Appointed Counsel for Defendant,
Charles W. Britt, Jr.*

DENIED

GEO. M. FOUNTAIN

Dec. 15, 1969

DEFENDANT EXCEPTS

EXCEPTION No. 87

MOTION IN LIMINE

COMES Now, defendant in the above entitled cause, and before trial and the selection of the jury moves the court in limine to instruct the solicitor and all others connected with the prosecution as set forth on the following grounds:

1. Since it is immaterial to this action whether or not a fingerprint of the defendant was found on a butcher knife in the house located at 222 Lawson Street in the City of New Bern, the prosecution is precluded from using any pleading, testimony, remarks, questions or arguments which might inform the jury of such fact.

2. If the above fact were made known to the jury, it would be highly improper and prejudicial to defendant, even though the court were to sustain an objection and instruct the court not to consider such fact for any purpose.

3. This motion should also be granted because there is no other way the problem mentioned can be handled at the trial of the cause, and in all probability any such attempt would result in a mistrial or in error.

4. In *State v. Minton*, 228 NC 518, 46 SE 2d 296 (1948), the court, declaring that the fact that a fingerprint (the left thumbprint) corresponding to that of the accused is found in a place where a crime is committed is without probative force unless the circumstances are such that the fingerprint could only have been impressed at the time

the crime was perpetrated, held that testimony that the print of the left thumb of one accused of breaking and entering with the intent to commit larceny, and of larceny, appeared upon the outside of a piece of glass which originally occupied a position near the knob of the front door of the place entered, which was a public place, had no legitimate tendency to show that he was present when the shop was broken and entered and the coins taken therefrom.

5. In the present case at the prior trial of this action, the State's evidence indicated that the defendant had been, at 222 Lawson Street on, at, least one occasion prior to the alleged time of the murder and that the defendant had handled the knife on the day before the body was discovered.

WHEREFORE, defendant respectfully requests the court to instruct the State and all its counsel not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, directly or indirectly, the above mentioned facts, without first obtaining permission of the court outside the presence and hearing of the jury, and further instructed State and all its counsel not to make any reference to the fact that this motion has been filed and granted and warn and caution each and everyone of their witnesses to strictly follow these same instructions.

This 25th day of November, 1969.

E. LAMAR SLEDGE

ROBERT G. BOWERS

Attorneys for Defendant

DENIED EXCEPTION No. 88

ARRAIGNMENT OF A PRISONER IN CAPITAL CASE

CLERK: Charles W. Britt, Jr., stand up, hold up your right hand.

CLERK: You stand charged by the name of Charles W. Britt, Jr. on the following bill of indictment—(read verbatim). How say you Charles W. Britt, Jr., are you guilty of the felony of Murder whereof you stand indicted, or not guilty?

DEFENDANT: Not Guilty.

CLERK: How will you be tried?

DEFENDANT: By God and my Country.

CLERK: May God send you a true deliverance.

WARNING PRISONER OF HIS RIGHTS IN CAPITAL CASE:

CLERK: These good men and women that you shall now hear called are to pass between the State and you upon your life and death, if, therefore, you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn, and you shall be heard.

Date: December 15, 1969.

JURY, DECEMBER 16, 1969

The jury consisted of the following:

- | | |
|---------------------------------|--------------------------|
| 1. Mrs. F. W. Riggs | 7. Charlie White |
| 2. Thomas Eborn, Jr. | 8. Wm. A. McKay |
| 3. Mrs. (Joyce) C. W. Daugherty | 9. Jacob Grace |
| 4. Wesley E. Bland | 10. Margaret C. Willis |
| 5. Franklin W. Taylor | 11. Maggie Hartley |
| 6. Mrs. (Georgia) J. B. Hobson | 12. Mrs. Dan B. Hartsell |

Alternate: L. V. McCoy

JUDGMENT AND COMMITMENT

In open court, the defendant appeared for trial upon the charge or charges of Murder in the First Degree and thereupon entered a plea of Not Guilty.

Having been found guilty of the offense of Murder in the Second Degree which is a violation of _____ and of the grade of Felony _____

It is ADJUDGED that the defendant be imprisoned for the term of thirty (30) years in the State Prison. It is ordered that this defendant be transferred to custody of the State Department of Correction pending his appeal unless appearance bond in amount of \$25,000.00 is posted.

It is ORDERED that the clerk deliver two certified copies of this judgment and commitment to the sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the

appropriate official of the State Department of Correction.
This 18 day of December, 1969.

GEORGE M. FOUNTAIN
Presiding Judge

Attorneys for Defendant: R. G. BOWERS & E. LAMAR SLEDGE
Attorney for the State: LUTHER HAMILTON, JR., Solicitor

Date certified copies of judgment delivered to sheriff for
commitment: 12/19/69

APPEAL ENTRIES

In apt time, the defendant objects and excepts to the
rulings and judgment of the court and gives notice of
appeal to the

Further notice waived.

The defendant is allowed 60 days to prepare and serve
case on appeal, and the State is allowed 20 days after such
service to prepare and serve counter case.

Appearance bond is fixed in the sum of \$25,000.00. Appeal
bond is set at \$

This 18 day of December, 1969.

Presiding Judge

It is ordered that defendant be transferred to custody of
the State Department of correction pending his appeal
unless appearance bond in amount of \$25,000.00 is posted.

CERTIFICATION TO DEPARTMENT OF CORRECTION

I certify that this document is a true and complete copy
of the original judgment and commitment in the case
named, now on file in this office, and that this copy is certi-
fied to the North Carolina State Department of Correction,
as in said judgment directed, as authority for the execu-
tion of the prison sentence therein imposed.

Witness my hand and the seal of the Superior Court.
This 19 day of December, 1967.

MARY P. McLAWHORN
*Assistant Clerk of the
Superior Court*

ORDER OF FOUNTAIN, J. IN STATE v. BEST

STATE OF NORTH CAROLINA
 IN THE GENERAL COURT OF JUSTICE—
 SUPERIOR COURT DIVISION
 COUNTY OF CRAVEN
 THE STATE OF NORTH CAROLINA
 v.
 ETHEL J. BEST 23-F-C

In this case wherein the defendant stands charged with the offense of Murder

It is now ORDERED: That the solicitor, having elected to take a nolle pros, *be granted leave to reopen this case for cause.*

This 17 day of December, 1969.

GEORGE M. FOUNTAIN
Presiding Judge

ORDER FOR MIMEOGRAPHING Etc.

This matter coming on to be heard upon motion of Robert G. Bowers, attorney for the defendant, for an order requiring the State of North Carolina to pay the necessary costs of obtaining a transcript of the proceedings herein and the necessary costs of mimeographing the case on appeal and appellant's brief under the supervision of the clerk of the North Carolina Court of Appeals as provided by GS 7A-300 (a) (8);

And it appearing to the court and the court finding as a fact that Charles W. Britt, Jr., at the December 15, 1969 Criminal Session of the Superior Court of Craven County, was convicted of the crime of second degree murder, and sentenced to thirty (30) years in the State's Prison on December 18, 1969, and said defendant gave notice of appeal to the Court of Appeals of North Carolina; and that said defendant has duly filed his affidavit of indigency and is unable to defray the costs of his appeal to the North Carolina Court of Appeals, and Robert G. Bowers and E. Lamar Sledge are hereby appointed as attorneys for said defendant in his appeal to the North Carolina Court of Appeals;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the State of North Carolina pay the necessary costs of obtaining a transcript of the proceedings herein and the cost of mimeographing the case on appeal and appellant's brief under the supervision of the clerk of the North Carolina Court of Appeals.

This 23 day of December, 1969.

GEORGE M. FOUNTAIN

Judge Superior Court

CASE ON APPEAL

This criminal action in which defendant seeks new trial was tried at the December Term of the Superior Court of Craven County, before the Honorable George M. Fountain, Judge presiding and jury, upon the issues set out in record.

STATE'S EVIDENCE

The State offered in evidence as its exhibits the following:

EXHIBIT No. 1: Butcher knife with blade 10 to 12 inches long, blade being bent almost at a right angle to the length of the handle.

EXHIBIT No. 2: Cast iron skillet approximately 6 to 8 inches in diameter.

EXHIBIT No. 3: Photograph showing body of murder victim Janie Banks in her residence.

EXHIBIT No. 4: Photograph showing outside view of deceased's residence.

EXHIBIT No. 5: Photograph of deceased's body showing small wound in deceased's back.

EXHIBIT No. 6: Paper containing four latent fingerprint lifts.

EXHIBIT No. 7: Fingerprint card containing inked impressions of the fingerprints of defendant Charles W. Britt, Jr.

EXHIBIT No. 8: Latent fingerprint lift contained on rubber type lifting material.

EXHIBIT No. 9: Latent fingerprint lift contained on rubber type lifting material.

EXHIBIT No. 10: Report of State Bureau of Investigation
concerning fingerprint comparisons.

DEBORAH ANN HUMPHREY Testified:

DIRECT EXAMINATION

I am 15 years of age and live at H-85, Craven Terrace, in New Bern. I have been going to Janie Banks' house at 222 Lawson Street for a long time. My aunt lives near Janie Banks on Lawson Street. I would go to Janie Banks' house to see if I could run any errands for her because she was sick sometimes.

I went to Janie's house on Tuesday, March 25, 1969 about 4:30 p.m. on my way to the store for my aunt. I was going to ask Janie Banks if I could bring her anything.

When there was no answer to my knock on the door, I took the mail from her box and opened the door to go in. Upon opening the door, I saw Janie Banks lying on the floor, with blood on her face and a burn mark on the side of her face. She was lying beside the sofa, her head towards the stove. I shut the door and ran back and told my aunt. I did not return to Janie Banks' house that afternoon.

CROSS EXAMINATION:

None.

MARY LEE KOONCE Testified:

CROSS EXAMINATION:

I live at Route #3, New Bern, Janie Banks, my 62 year old mother, lived at 222 Lawson Street and had lived there for 12 or 15 years. She was not married. She lived alone, but Jason Lewis lived there part time. Due to my illness, I had not seen my mother for two weeks prior to her death.

CROSS EXAMINATION:

None.

JASON LEWIS Testified:

DIRECT EXAMINATION:

Janie Banks was my great aunt. I lived with her part time, and part time with my cousin on Queen Street. At about the time when Janie was killed, I was doing construction work on a foundation for a water tank at Wash-

ington, N. C. I also had a part time job driving a cab. I would stay with my cousin, but would go to my aunt's to change clothes when I was going to drive a cab. I kept my construction work clothes at my cousin's house. My dress clothes, which I wore when I drove a cab, were at Janie's house.

The last time I went to Janie's house was on the Saturday night before Janie's death on Monday, to change my clothes. I did not spend the night, but washed up, changed clothes and shaved, and left. I did not go back to Janie's again until after her death. The last time I spent the night at Janie's was the Saturday a week before Janie's death on Monday.

My clothes were in the room next to the kitchen. The rooms in the house are in a line—the front room, Janie's bedroom, my bedroom and then the kitchen.

CROSS EXAMINATION :

I am not now and never have been married. Nobody else that I know of lived in that house other than Janie Banks and me. When I went to Janie's to change clothes the Saturday night before her death, I was there about 30 minutes.

I went down to the police station and talked to Mr. Bratcher on the night of the Tuesday when Janie's body was found. I was with Mr. Bratcher about 45 minutes or an hour. Detectives Bratcher and Dowdy later came to see me. Mary Koonce told me to come down here to testify. Nobody has asked me what I was going to testify to, and I have not discussed my testimony with Mr. Hamilton or anyone else; I "ain't discussed it with nobody."

P. M. BRATCHER Testified:

DIRECT EXAMINATION :

I am a Captain, Detective Division, New Bern Police Department, and was so acting on March 25, 1969. On that date I went to 222 Lawson Street, New Bern, at approximately 4:30 or 4:35 p.m., accompanied by Officer Dowdy.

When I arrived, a crowd of people had gathered in the street and cars were parked about. Police Officers T. W. Connor and P. O. Rogers were on the scene. I opened the

screen door and the wooden front door, and walked into the living room at 222 Lawson Street. When I walked into the living room, I saw the usual furniture that is in a living room—what they call a divan—some people call it a long chair, regular living room chairs, television, end tables sitting in the corners—“and a body laying in the floor in front of the divan.”

The body was that of a female person, lying diagonally in front of the divan, flat of its back. The body was fully clothed, including dress and sweater, and socks, but no shoes. A pair of women's boots or overshoes was present, one lying under the head of the body and the other lying nearby.

There was a large pool of blood underneath the head of the body. Blood had run across the floor toward the door to the bedroom. “The body had large wounds about the head that was opened up.” There was a small piece of a meaty substance about two inches long lying in the pool of blood in the floor. The blood was red, and mostly dry. You could move the top portion of it.

Between the end of the divan and the heater, which is a very small space, I found a butcher knife with a blade about 10 to 12 inches long, the blade curved or bent from near the handle. Under the end table beneath the window was a frying pan about 6 to 8 inches in diameter, which also had a meaty substance in it.

Witness identified State's Exhibit No. 1 as the butcher knife he had described.

Defendant objects. Objection overruled.

EXCEPTION No. 1

Witness identified State's Exhibit No. 2 as the frying pan which witness had described.

Defendant objects. Objection overruled.

EXCEPTION No. 2

The curvature of the blade of the knife is the same as when I first picked it up.

Defendant objects. Objection overruled.

EXCEPTION No. 3

The substance in the frying pan is the same as when I picked it up.

Defendant objects. Objection overruled.

EXCEPTION No. 4

Witness identified State's Exhibit No. 3 as a photograph accurately representing the position of the body, location of the shoes, the position of the bloodstains, and the wound to the head, as witness had described in his testimony.

Defendant objects. Objection overruled.

EXCEPTION No. 5

Witness identified State's Exhibit No. 4 as photograph accurately representing outside view of deceased's house on March 25, 1969.

Defendant objects. Objection overruled.

EXCEPTION No. 6

The house is very small. It is about 16 or 18 feet wide and 40 or 45 feet long. It has four rooms. The front room is the living room, containing a chair behind the front door, a heater, a sofa, a table with a lamp, and a stand holding a television set. A door opens from the living room into the second room, a bedroom. The bed across one end of this room had two mattresses on it, along with quilts and blankets and pillows and other things. To the right was a dresser. Lengthwise the room was another bed. A door opened into the third room, also a bedroom. In this room, on the left side as you enter, is an outside door. A door opens from this bedroom into the fourth room, the kitchen. The kitchen contained cookstove, table, cabinets, and sink of the usual kitchen type. A door opens from the kitchen to a small back porch. There is an outhouse behind the house.

I noticed the beds in the house. On the bed in the first bedroom, the blankets and quilts and things were disturbed. One of the mattresses was turned up. One or two ladies' purses were lying on the bed, and two or three of them were lying on the floor. "It was just jumbled up in general." In the second bedroom, a pair of men's shoes was sitting beside the bed and a pair of men's pants were on the bed. Other than that, it was the usual clothing and stuff.

Defendant moves to strike. Motion overruled.

Defendant excepts.

EXCEPTION No. 7

I was at the house on this occasion about an hour or an hour and a half. I called the coroner and the funeral home. I walked around the house and the grounds. I dusted for fingerprints inside the house; took photographs, and after about one or one and a half hours left and went to the funeral home.

At the funeral home, I assisted in stripping the body. On the left arm was a small wound. In the left back, about 2 or 3 inches off the backbone, approximately over the left kidney, there was a wound approximately an inch long and very narrow.

Witness identified State's Exhibit No. 5 as photograph of the body, showing the appearance of the wound in the back as described in witness' testimony.

Defendant objects. Objection overruled.

EXCEPTION No. 8

There is a circle on the photograph indicating the small wound in the deceased's back.

Defendant objects. Objection overruled.

EXCEPTION No. 9

I recall that I dusted the TV, the end table, and some of the purses, for fingerprints. I dusted the knife at the police station.

Defendant objects. Objection overruled.

EXCEPTION No. 10

I did not dust the frying pan. I discovered fingerprints on the knife.

Defendant objects. Objection overruled.

EXCEPTION No. 11

The method I used to dust for fingerprints was to apply black powder with a brush.

Defendant objects. Objection overruled.

EXCEPTION No. 12

I saw fingerprints on some of these objects.

Defendant objects. Objection overruled.

EXCEPTION No. 13

I made lifts of fingerprints—

Defendant objects. Objection overruled.

EXCEPTION No. 14

—from the knife—

Defendant objects. Objection overruled.

EXCEPTION No. 15

—at the police station downstairs in the detectives' room at the city hall—

Defendant objects. Objection overruled.

EXCEPTION No. 16

—on Wednesday morning, March 26, 1969.

Defendant objects. Objection overruled.

EXCEPTION No. 17

The knife had been in my possession from the time I picked it up at the house until I made the lift.

Defendant objects. Objection overruled.

EXCEPTION No. 18

My experience in making latent fingerprint lifts consists of—

*Defendant objects. Objection overruled.

EXCEPTION No. 19

—dusting and lifting fingerprints for about 15 or 16 years, and I have taken a course in fingerprinting and have a diploma from the Institute of Applied Science in Chicago.

I lifted the print from the knife—

Defendant objects. Objection overruled.

EXCEPTION No. 20

—by use of black powder and what I call scotch tape and put it on a piece of paper with a white background—

Defendant objects. Objection overruled.

EXCEPTION No. 21

—and I have that piece of paper here in my file. These four black splotches underneath the scotch tape on this white paper are latent fingerprints,—

Defendant objects. Objection overruled.

EXCEPTION No. 22

—all of which came from the knife.

Defendant objects. Objection overruled.

EXCEPTION No. 23

They did not all come from the same place on the knife.

Defendant objects. Objection overruled.

EXCEPTION No. 24

After making the latent print from the knife and transferring it to the paper,—

Defendant objects. Objection overruled.

EXCEPTION No. 25

I turned the paper over to SBI Agent Jones at the SBI Laboratory in Raleigh on March 31, 1969.

Witness identified State's Exhibit No. 6 as a paper containing latent fingerprints which he had obtained.

At the same time, I turned over to SBI Agent Jones—

Defendant objects. Objection overruled.

EXCEPTION No. 26

—the knife, two more latent fingerprints lifted by means of a rubber type lift, and four fingerprint cards containing fingerprints of defendant, James E. Lewis, Elijah Brown, and Ethel J. Best, respectively.

Witness identified State's Exhibit No. 7 as fingerprint card of defendant Charles Britt.

Defendant objects. Objection overruled.

EXCEPTION No. 27

Witness identified State's Exhibit No. 8 as a small rubber type lift containing a latent fingerprint, and identified State's Exhibit No. 9 as a larger rubber type lift containing a latent fingerprint.

I first saw defendant on Saturday, March 29, 1969 at I-80 Trent Court, New Bern, which is in the housing project

—

Defendant objects. Objection overruled.

EXCEPTION No. 28

—at around 2:30 or 3 o'clock p.m. Defendant Britt was not

present when I arrived there, but he appeared there four or five minutes later. Officer Dowdy and I talked with Ethel Best and defendant Britt for a few minutes and Officer Dowdy and I asked Britt and Best to go down to the police station with us. We took them, along with Best's two small children, to the detective room in the basement of the City Hall. When I got to the basement of the City Hall I advised Britt of his rights,—

Defendant objects. Objection overruled.

EXCEPTION No. 29

—using a card I carry with me.

Defendant objects.

VOIR DIRE UPON VOLUNTARINESS OF DEFENDANT'S ALLEGED STATEMENT, IN ABSENCE OF JURY—DIRECT EXAMINATION.

I have here the same card I used at that time; I read it to Britt and Best at the same time. Defendant said he understood his rights and that he would talk to Officer Dowdy and me. Defendant was not under arrest at that time.

I next saw Britt on Wednesday afternoon, April 2, 1969 at the Little Mint on Broad Street in New Bern, when Officer Dowdy and I told Britt and Best we wanted them to go back down to the police station with us again. We took them again, along with Best's two children, to the City Hall basement. Again I read them the card advising them of their rights. Defendant was not drinking to my knowledge on either of those occasions, and no threats were made against him or promises or inducements made to him. On April 2, 1969 I advised Britt he would be held for Grand Jury action regarding the murder of Janie Banks.

I next saw Britt on Thursday, April 3, 1969 at the jail, as the result of a telephone call. Britt stated he wanted to tell me the truth about it. I told him to wait until I got to some place that I could advise him of his rights. Before and after I read the card to him again he related what happened. I read the card to him and he said he knew what his rights were.

I next saw Britt on Friday morning, April 4, 1969, at

about 10 or 10:30 a.m., again at the City Hall. Again I read this card to him and Best together, advising them of their rights. Britt said he understood it. No threats, promises, or inducements were made to Britt on either of these occasions, nor was Britt in my opinion under the influence of liquor or drugs. Rather, he appeared normal.

Defendant objects. Objection overruled.

EXCEPTION No. 31

VOIR DIRE—CROSS EXAMINATION

On March 29, 1969, when I found Britt at I-80 Trent Court, no information was requested of Britt. Britt and Best stated they had been at 222 Lawson Street on Monday afternoon, and I then told them I wanted them to come downtown. Officer Dowdy and I took them and Best's two small children in the police car down to City Hall. At the City Hall, I read them this same card advising them of their rights.

I do not know the exact time I got to I-80 Trent Court on that day. It was in the afternoon, I would say about 2:30 or 3 p.m. I do not recall the exact time we arrived at the police station,—I would say it took us 15 or 20 minutes to get there. I do not know if we were logged in on the police radio when we arrived at the City Hall. I made no written record of the time and know of no record being made unless such might be contained in the police radio log. I do not know exactly how long we were in the City Hall before I read the card to Britt and Best. I read the card to them immediately after we got downstairs and got situated, got everyone seated. I would say we remained there about 30 to 45 minutes. I do not remember testifying in November that we were there between an hour and an hour and a half. I wouldn't say whether we were there 45 minutes, an hour, or an hour and a half. I made no record at the time. Both Officer Dowdy and I asked questions of Britt and Best. I can't recall which of us asked which questions. I asked both Best and Britt questions about the frying pan and the knife. When we left City Hall, we took Best, the children, and Britt back out to Trent Court. I do not recall when we got back to Trent Court, but it was light and I went from there straight home for supper.

On April 2, 1969, I recall that I saw Best and Britt at the

Little Mint. I recall Britt was dressed in pants, jacket, and shirt. I do not recall the color of his clothes. I could have testified in November as to the color of clothes he wore. I believe the jacket was dark and the pants kind of light. I can't now remember the color and if I testified in November as to the color of his clothes, I could have forgotten since November.

It is possible that at the time I testified in November I was unable to recall the date I saw Best and Britt at the Little Mint. I do not recall now that in November I couldn't remember the date I saw them at the Little Mint.

On that occasion I saw them at about 3:30 or 4 p.m. It could have been at 3 p.m. I saw them. At that time, I took Britt, Best, and Best's two children down to the City Hall. I showed Britt the SBI fingerprint message and asked him to explain what his left thumbprint was doing on the knife. Britt gave me an explanation. I do not recall what time we arrived at the police station; I made no record of it. I do not know that anyone else made any record of it.

I would say we were in the City Hall basement a couple of hours or an hour and a half; it was dark when we came out. I made no record of the time I arrived or left.

I told Britt that all I wanted was the truth; that if he told me anything I wanted him to tell the truth. I did not tell him anything that might happen to him if he did not tell the truth, or if he didn't tell me anything. I told him I had enough evidence that I was going to hold him for the Grand Jury. I did not know what the Grand Jury was going to do with him. I did not tell him I had all the evidence I needed, nor that I had enough to convict him and that I didn't care whether he said anything to me or not. I did tell him when I locked him up in jail that if he wanted to see me again, he could call for me.

On the evening of April 3, 1969, as the result of a telephone call, I went back to the jail and took Britt to the police station. I do not know the exact time we arrived at the police station,—I would say it was roughly 7 or 7:15 p.m. I made no record of the time and filed no report of the interview. No one was present except Britt and me. At the City Hall I again read Britt the same card advising him of his rights. I would say we were there about an hour. I do not remember testifying in November that we

were there an hour and a half, but that could be correct. Britt stated he wanted to tell me the truth about what happened. We sat there and talked approximately an hour or longer.

I did not reduce anything to writing, or have him sign any statement, or record any statement, reduce the interview to permanent form in any manner.

I committed his statements to memory. I do not remember everything that happens without the necessity of ever reducing anything to writing, but I remember a lot. My memory is not that much in error—maybe a word or two might be in error, but my memory is not that bad. I did not make or write up any report of any kind concerning my April 3rd interview with Britt, and I know of no report ever made by anyone concerning it. I was the only person there to write up any report on the night of April 3, 1969.

(The court made the following finding and ruling upon the voir dire examination:

Upon the questions by the solicitor seeking to elicit testimony from Officer Bratcher relating to conversation between Officer Bratcher and the defendant and statements made by the defendant to Officer Bratcher on March 29th, April the 2nd and April 3rd, and April 4th of 1969, and from the evidence offered by the State, and the defendant having declined to offer any evidence, the court finds as a fact that on each of those days before any questioning of the defendant, he was read a card by Officer Bratcher as follows: "Your rights," Under that: "Before you are asked any questions it is required that you be advised of your rights." Under that, "Number 1: You have a right to remain silent; Number 2: anything you say can and will be used against you in court; 3: You have the right to talk to a lawyer and have him present while you are being questioned; 4: If you cannot afford a lawyer you have the right to request the court to appoint one for you before you answer any questions; 5: If you decide to answer questions without a lawyer, you may refuse to answer any particular question or stop answering at any time you wish to do so; 6: Having been advised of your rights do you want to answer questions before

you talk with a lawyer?" Under that: "Waiver: Do you understand each of the rights I have explained to you?"

Whereupon the defendant on each occasion stated to Officer Bratcher that he did understand his rights as explained to him. At no time did Officer Bratcher or any other person offer any threats against the defendant or offer him any reward or hope of reward to make any statement to the investigating police; that he had fully understood each of the rights as explained to him by Officer Bratcher on four separate occasions and any statements he made to the officer was knowingly, freely and voluntarily made with a full and complete understanding of his rights; that all statements made by the defendant were voluntary, without any reward or hope of reward and not as a result of any duress or threatened duress; that such rights as the defendant did not exercise were knowingly, voluntarily, freely and understandingly waived by him.

"The objection of the defendant is, therefore, overruled.")

Defendant excepts.

EXCEPTION No. 32

IN THE PRESENCE OF THE JURY

P. H. BRATCHER, Direct Testimony Continued:

Officer Dowdy and I went to I-80 Trent Court at about 2:30 or 3 p.m. on March 29, 1969. We found Ethel Best and her two small children there. Defendant Britt came in a few minutes later. Officer Dowdy and I talked with Britt and Best a few minutes, then asked them if they would go down to City Hall where we could talk further and they said they would. We took Britt, Best and Best's two small children in the police car to the detectives' room in the basement of the City Hall. We got situated and all had chairs. I believe Best held one of the kids and Britt held the other one. I advised Britt and Best of their rights.

Defendant objects. Objection overruled.

EXCEPTION No. 33

I asked Britt if he went around to 222 Lawson Street on Monday afternoon, March 29, 1969. Britt stated he and

Ethel Best went to 222 Lawson, which is Ethel's grandmother's home. He stated a babysitter was with Best's two children at 1-80 Trent Court, and the babysitter couldn't stay long, so they didn't stay long at 222 Lawson Street. I asked him what he did while at Lawson Street. Britt said he went to the outhouse, and that he drank two glasses of water while there. He said the deceased, Janie Banks, went in the kitchen and brought the water to him in the living room. He said they stayed there about 10 or 15 minutes, and that it was raining at the time. I asked him if he had ever seen this knife or the frying pan before (referring to State's Exhibits Nos. 1 and 2). He stated no. That was the extent of conversation with defendant on that occasion, and Officer Dowdy and I took Best, Britt, and the two children back to Trent Court by automobile.

I next saw defendant Charles Britt on the afternoon of Wednesday, April 2, 1969 at the Little Mint on Broad Street. Defendant was inside the Little Mint, and Ethel and her two children were sitting in an automobile out front. Officer Dowdy and I waited for Britt to come out and we advised him and Best we wanted them to go back down to the police station. We went to the detectives' room at City Hall, and I advised Best and Britt of their rights again. Best's two children were present. At that time I possessed a report from the SBI Laboratory in Raleigh pertaining to the knife and fingerprint. This is the actual report which I then possessed.

Witness identified State's Exhibit No. 10 as SBI Laboratory report relative to fingerprint comparison.

I let Britt have this report and told him to read it. I told him what it was and I would like for him to give me an explanation why his fingerprint was on the knife.

Defendant objects. Objection overruled.

EXCEPTION No. 34

I observed him read the report, and I asked him again if he could give me an explanation. Britt said he didn't know his fingerprint was on it. I said, "You have read the report; that's what the man up in Raleigh to the SBI says." Then Britt stated that the only reason he could figure that his fingerprint was on this knife was that on Monday after-

noon when he was at 222 Lawson Street, the knife was lying at the end of the divan by the heater; that he picked it up and started to throw it in the heater, but he didn't. He laid it back down. I asked Britt if at that time the knife was bent in the same shape it is now. Britt stated it was not, that it was then straight as the usual knife's blade.

I did have further conversation with Britt on that occasion.

Defendant objects. Objection overruled.

EXCEPTION No. 35

Officer Dowdy and Best and Britt and I talked further, and I asked Britt what condition the deceased was in when they left that afternoon and he said she was perfectly normal, that she was all right.

When we got ready to leave that afternoon from the City Hall I advised Britt he would be held for the grand jury in the murder of Janie Banks. I had the police take Best and her two children back to Trent Court. I took Britt to jail and turned him over to the custody of the jailer. I told Britt at that time that if he wanted to see me—

Defendant objects. Objection overruled.

EXCEPTION No. 36

—any further he could call for me; that the jailer would get in touch with me.

Defendant moves to strike. Motion overruled.

Defendant excepts.

EXCEPTION No. 37

That was on Wednesday.

I next saw defendant Britt on Thursday evening. I was at home about 6 or 6:15 p.m. when the telephone rang and it was the jailer at Craven County jail.

Defendant objects. Objection overruled.

EXCEPTION No. 38

He stated to me—

Defendant objects. Objection overruled.

EXCEPTION No. 39

—that defendant Britt wanted to talk with me.

Defendant moves to strike. Motion overruled.

EXCEPTION No. 40

I advised him as soon as I could get through with supper I would come down and talk with Britt.

Defendant moves to strike. Motion overruled.

Defendant excepts.

EXCEPTION No. 41

I went down to the jail about 7 or 7:15 p.m. that Thursday night. After I arrived at the jail—

Defendant objects. Objection overruled.

EXCEPTION No. 42

I had the jailer bring Britt out and started back to the police station with him and Britt stated he wanted to tell me the truth about what happened up at 222 Lawson Street on the afternoon of Monday the 24th. I advised Britt to wait until we could get in a position that I could advise him of his rights again; that it was required that I advise him of his rights each time I talked to him. We got to the City Hall and I advised Britt of his rights.

Britt stated that on Monday at about 4:30 p.m., he and Ethel Best went to her grandmother's at 222 Lawson Street. They had a baby-sitter to stay with the children and the baby-sitter couldn't stay long, so they stayed only 10 or 15 minutes at the Lawson Street address. Britt stated he went out and used the outhouse. He got two glasses of water which the deceased brought to him from the kitchen. He and Best left and went back to I-80 Trent Court. The baby-sitter left and they remained at Trent Court about 30 to 40 minutes. Britt stated he took this knife (referring to State's Exhibit No. 1) from Best's kitchen and put it in his pocket. He, Best, and the two children went back around to 222 Lawson Street. He stated they went in and sat down, each holding a child, one in one chair and the other in another chair. Deceased was sitting on the sofa. In a few minutes deceased got up and went out of the front room towards the kitchen. Britt said that at that time he passed the knife over to Best.

Deceased came back in and sat on the sofa. In a few

minutes, deceased got up to put some wood in the heater, and at this time Best struck deceased in the back with the knife. The knife folded up. The deceased sat down in the floor and started screaming and hollering, calling names that Britt didn't know. He said Best went in the kitchen and came back out with the frying pan. Deceased was still sitting up in the floor hollering. Britt took the frying pan and hit deceased over the head three, four, or five times—he didn't know exactly how many. He stated he took the knife from Best at the time and started to throw it in the heater, but he didn't. Britt stated he and Ethel Best both looked for money but could not find any. They took the two children and went back to I-80 Trent Court. They stayed there for a while. Britt then went to the Little Mint to see about a job; he said the man there had told him to come in and help him clean up. Britt stayed at the Little Mint until about 10 p.m. and then Britt took Best and the two children to a friend's home on Lincoln Street and left them. Britt went back to the Little Mint, helped the man clean up and went back to Lincoln Street where he picked up Best and the two children and went back to I-80 Trent Court and spent the rest of the night.

I advised Britt on this Thursday night that the next day I would pick up Best as soon as I could make arrangements for the Welfare Department to care for the two children. The following morning, Friday, I made arrangements for Welfare Department representatives to meet Officer Dowdy and me at I-80 Trent Court to take custody of the children. However, Best's father was at Trent Court and was allowed to take custody of the children.

Officer Dowdy and I took Best to the police station. We got Britt out of jail, carried him back to the station. With Britt and Best together at that time, I advised them of their rights.

Defendant objects. Objection overruled.

EXCEPTION No. 43

We discussed what happened at 222 Lawson Street on Monday, March 24, 1969.

Britt stated again what had occurred, the same as he had stated it to me the previous night.

Defendant objects. Objection overruled.

EXCEPTION No. 44

I can relate the lifts of fingerprints on State's Exhibit No. 6 to a location on the knife,—

Defendant objects. Objection overruled.

EXCEPTION No. 45

—by pointing out the spot on the knife where they were. The print which is at the upper right-hand corner of State's Exhibit No. 6 was taken from the knife—

Defendant objects. Objection overruled.

EXCEPTION No. 46

—on the inside of the bend of the blade, approximately where I have my finger (witness indicating location). I did not personally make the lifts of prints marked as State's Exhibits Nos. 8 and 9.

When I say that I advised the defendant of his rights, I mean I have a little card that I read to each defendant at the time I talk to him. (The witness quoted the same explanation or statement of rights as previously quoted by the trial judge and set out herein in the latter's ruling upon voir dire examination into voluntariness of defendant's alleged statements to the witness.) On each occasion, Britt acknowledged that he understood his rights

CROSS EXAMINATION:

Around the last of March or the first of April I took some fingerprint lifts and other items to the SBI Laboratory in Raleigh, including a fingerprint card for an Elijah Brown, and a fingerprint card for a James E. Lewis who is the same person as Jason Lewis who testified here today.

I have identified State's Exhibit No. 8 and State's Exhibit No. 9, and I remember testifying with respect to the same lifts in November.

Q. Do you remember testifying that you made the lifts and you didn't know where in the house you found them?

A. No, sir, I remember testifying that I was unable to find any other fingerprints other than the one on the knife there in the house.

Q. Didn't you testify whatever these lifts were that you made them yourself?

I remember testifying that I dusted the television, and pocketbooks in the bedroom, and found no fingerprints. I did not dust the heater.

I arrived at 222 Lawson Street on March 25th at about 4:30 or 4:35. I made no record of the time I arrived. I took the photograph marked as State's Exhibit No. 4 at about 5 p.m. on March 25th. I left the Lawson Street address at about 6 p.m.; I had been there about an hour or an hour and a half. I made no record of the time I departed.

I did testify in November that I examined the body and could look at the brain material on the inside of the head of the body. As I recall, the meaty substance in the frying pan and lying in the blood on the floor appeared to be liverwurst or spam or potted mean, or something similar that you might find frying in a frying pan.

When I got inside the house on Lawson Street, I walked around and observed in the room a few minutes, then went back out and got the fingerprint kit and the camera, and went back in. I was inside the house about 20 to 30 minutes. I spent about 5 to 8 minutes using the fingerprint equipment, and about 5 to 8 minutes taking photographs. I made no measurements with respect to location of the body in relation to other objects; rather, I photographed the body. That night I talked to Jason Lewis. I did not write or dictate any report on that date with respect to my investigation.

I dusted the knife for fingerprints at the police station the next morning. On Monday morning, March 31st, I took the knife to Raleigh to SBI Agent Jones. I brought back the fingerprint cards of Brown, Lewis, and Best.

On March 29th, I saw Britt at I-80 Trent Court. Officer Dowdy and I had gone there to talk to Ethel Best. The defendant came in. Officer Dowdy and I talked to the defendant and Best, told them we were investigating the death of Janie Banks, and asked them some questions. I asked when was the last time they had been to Janie's and they said Monday afternoon at about 4:30. At that point we took them down to the police station, where I cautioned them as to their rights. I had not advised them as to their rights at Trent Court because they were not then suspects and I did not know they had been to Janie's until they told me.

We were at the police station on that occasion about 30 to 45 minutes, maybe a little longer. I did not keep account

of the time, and I do not remember testifying in November, that we were at the City Hall an hour to an hour and a half. I kept no written record or report of any conversation on March 29th.

On Wednesday, April 2, 1969, I found Britt and Best at the Little Mint. I do not recall the exact time I saw them there. It was about 3:30 or 4 p.m. Officer Dowdy and I took them to the City Hall, where we remained maybe two hours. I told Britt at that time that he was being held for the grand jury, and I took him in custody and placed him in jail. There was not a warrant outstanding against him at that time, to my knowledge. The coroner's inquest was held April 7th. No warrant or process was issued against Britt from April 2nd to April 7th, to my knowledge.

On April 3rd, as a result of a telephone call, I took Britt over to the identification office at the City Hall. I did not make any record of the time I got him out of jail, nor of the time I returned him to jail. I made no written report or record of what transpired on the occasion of that interview. I did not reduce to writing any statement Britt may have made then, nor did I then or at any other time ask Britt to sign any statement or any other document.

Nothing Britt said to me then was reduced to writing by anyone, apart from the record of the coroner's inquest. On the evening of April 3rd at the City Hall, no one was present except Britt and me.

I lifted one latent fingerprint from the blade of the knife on the inside of the bend or curve, about an inch or so from the handle. On State's Exhibit No. 6, this lift appears in the upper right-hand corner. The other three latent prints on State's Exhibit No. 6 are lifts of the same fingerprint smudge; I redusted the print each time to try to bring it out more clearly. The only places in the house that I dusted for fingerprints were the television table, the television, and pocketbooks. I did not dust anywhere in the bedroom other than the pocketbooks. I did not see anything worth while to dust in Jason's bedroom.

There were three outside doors to the house—the front door, the door on the left side of the house, and the back door. I do not recall which way they opened.

The first time I asked Britt about the knife was on March 29th, at the City Hall. Britt stated then he had never before

seen the knife. The next time I talked to Britt was on April 2nd, when Britt said he had seen the knife on the floor beside the sofa; that it was straight rather than bent and that he picked it up and started to throw it away, but changed his mind and put it back where he had found it. I asked him to explain why his fingerprints were on the knife, and he explained.

If I said at the previous trial that I had dusted the water glass found in the house, I was in error.

JOHNNIE PATE Testified:

DIRECT EXAMINATION:

I am a detective with the New Bern Police Department; I have been with the department about 19 years, about 7 years with the Detective Division. I know the defendant, Charles Britt, Jr.

Witness identified State's Exhibit No. 7 as a fingerprint card containing rolled ink impressions of the ridges on the fingers of both hands of Charles W. Britt, Jr., defendant.

I took Britt's fingerprints myself, and placed the impressions of each finger in the locations as indicated on the card. I signed the card, and Britt signed it in my presence.

CROSS EXAMINATION:

None.

STEPHEN RANDOLPH JONES Testified:

DIRECT EXAMINATION:

I am supervisor of the Identification and Photography Division of the North Carolina State Bureau of Investigation. I will have been employed in the Identification Division of SBI 7 years as of January 1, 1970. My experience includes employment with the FBI in Washington, D.C. for 2 years and 9 months prior to military service and my present employment. The first 3 months I was with the FBI consisted of classroom training in the science of fingerprint identification. I have been in training in the field of latent print examination and comparison since January of

1963. I have been primarily engaged in comparison of fingerprints since 1964. I have testified concerning fingerprint comparisons in Recorders Courts, District Courts, and Superior Courts throughout North Carolina.

(In the absence of the jury, the court at the request of the State found the witness an expert in the field of fingerprint identification.)

I saw Mr. Bratcher of New Bern Police Department, along with Officer Dowdy, on March 31, 1969 at the SBI Laboratory in Raleigh. Mr. Bratcher delivered to me at that time six latent print lifts, one butcher knife, and inked fingerprint impression cards bearing the names of Charles W. Britt, James E. Lewis, Elijah Brown, and Ethel Jeannie Best.

I examined the latent prints, and also the butcher knife to see if there were any fingerprints still visible on it. I could not raise any more latent fingerprints, nor could I even photograph those that were on the knife so that they would be legible.

I made a mark of identification regarding the print which I identified. State's Exhibit No. 6 contains in the upper right-hand corner the print which I was able to identify. I compared the print just referred to with the fingerprint card, State's Exhibit No. 7. I compare the ridge details or the characteristics of the ridges in the fingers, and in order to make an identification I must find a certain number of characteristics in common between the two prints. In this particular instance, I compared the latent print lifts on this paper with the inked impressions on this fingerprint card and notes similarities in the left thumbprint, under a magnifying glass of 4½ power, I examined this for position of ridgy lines, bifurcations, endings, and ridge dots. These are the four types of identifying characteristics which are found in fingerprint ridges.

I saw similarity between the two prints—

Defendant objects. Objection overruled.

EXCEPTION No. 47

—and in certain respects they were similar.

Defendant objects. Objection overruled.

EXCEPTION No. 48

I found enough points of identification in the same approximate location on the latent prints, or in the same relative positions with each other, as were noted on this inked impression card.

From my examination of the print, I have an opinion satisfactory to myself as to whether or not the latent print contained on State's Exhibit No. 6 is the same as the fingerprint of which there is an inked impression labeled as the left thumb on the card marked as State's Exhibit No. 7.

Defendant objects. Objection overruled.

EXCEPTION No. 49

It is my opinion that the finger that made the latent print as noted on State's Exhibit No. 6 and the finger that made the inked impression as noted on State's Exhibit No. 7 are one and the same finger.

Defendant moves to strike. Motion overruled.

EXCEPTION No. 50

I was unable to match the other prints submitted to me with any of the inked fingerprint impressions on the other fingerprint cards.

There was one latent print lift on one of the rubber lifts, that is State's Exhibit No. 9, that had enough points to be identifiable, but it has not been identified.

CROSS EXAMINATION :

I attempted to photograph the knife, using a copy camera with polaroid film and available light, for the purpose of bringing out any latent print. This is a generally acceptable method for locating and lifting or identifying fingerprints. This is a good method of determining where the latent print is on the object and how it is situated on it, and is a better method than dusting with powder. Such photography might preserve the print in the event there is an improper lift from another method.

Lifting material may be of the rubber type, such as was used in State's Exhibits No. 8 and No. 9, or of the scotch tape type. Some of the scotch type tape deteriorates with age, and may have flaws in the sticky or tacky layer if it is not the type made especially for fingerprint work. I cannot say that the tape used in State's Exhibit No. 6 is actu-

ally the tape manufactured purposely and simply for fingerprint work.

I do not know of my own knowledge where the lifts on State's Exhibits No. 8 and No. 9 came from. The location from which those lifts were taken was made known to me by Officer Dowdy. I did not myself go to 222 Lawson Street and attempt to lift any prints there. I would have no knowledge regarding any error or mistake in the method or location of the finding of these prints.

W. F. DOWDY Testified:

DIRECT EXAMINATION:

I am employed by the State Bureau of Investigation, at Rocky Mount, N. C., and have been with the SBI since July 1, 1969. Prior to that time, I was a detective with New Bern Police Department. I was so employed in March, 1969 and at that time had been a detective for about 9 months.

On Tuesday, March 25, 1969, I went with Captain Bratcher to 222 Lawson Street. I observed the body on the floor, made a crime scene search of the house, and dusted several items in the house for latent fingerprints.

Defendant objects. Objection overruled.

EXCEPTION No. 51

I dusted a water glass found in the chair on the left as you go in the door. I also dusted a whiskey bottle that was located on the bed in the first bedroom as you go in the house, and several pocketbooks that were on the floor in the same bedroom.

I made one lift from a water glass and one from the whiskey bottle, I believe.

Defendant objects. Objection overruled.

EXCEPTION No. 52

I made the lift marked State's Exhibit No. 9 from the water glass.

I next saw defendant Charles W. Britt, Jr. on Saturday, March 29, 1969 at I-80 Trent Court. I participated in questioning of defendant at the Detective Division at police department, at which time Captain Bratcher, defendant, Ethel

Best and myself were present. I did not have anything to do with warning defendant of his rights at that time;

Defendant objects. Objection overruled.

EXCEPTION No. 53

Captain Bratcher warned the defendant.

Defendant moves to strike. Motion overruled.

EXCEPTION No. 54

Captain Bratcher warned defendant in my presence.

Defendant objects. Objection overruled.

EXCEPTION No. 55

I was present throughout the conversation on that occasion.

Defendant objects. Objection overruled.

EXCEPTION No. 56

At that time the defendant said—

Defendant objects. Objection overruled.

EXCEPTION No. 57

—that on Monday afternoon, March 24th, he and Ethel Best went to the residence of Janie Banks; that they left her children at I-80 Trent Court with a baby-sitter. They stayed there about 30 minutes; that Britt drank a couple of glasses of water while there; that they left and returned to I-80 Trent Court; and that Janie Banks was in a normal condition when they left.

Defendant objects and moves to strike.

Objection and motion overruled. Defendant excepts.

EXCEPTION No. 58

I next saw defendant on April 2nd, Wednesday afternoon, when Captain Bratcher and I picked up defendant and Ethel Best at the A & W or Little Mint Drive-In on Broad Street and took them to City Hall. I was with the defendant at the same time that Captain Bratcher was with him. I was present when Britt made certain statements in Captain Bratcher's presence.

Defendant objects. Objection overruled.

EXCEPTION No. 59

Those statements were—

Defendant objects. Objection overruled.

EXCEPTION No. 60

—made after defendant read the SBI Laboratory report and was asked to explain the presence of his left thumbprint on the knife. He stated that on Monday afternoon when he and Ethel Best were at victim's house he noticed the butcher knife which was at that time in straight and normal condition lying on the floor; that he picked up the knife and was going to throw it in the heater but instead threw it back on the floor; and that is why his thumbprint was on the knife.

I was not present at any conversation between defendant and Captain Bratcher on the following Thursday night.

I did not see Britt from that Wednesday afternoon until the following Friday morning, April 4th. At that time, I saw him at the City Hall. Captain Bratcher, defendant, Ethel Best and I were present. I heard the conversation between defendant and Captain Bratcher, and defendant said—

Defendant objects. Objection overruled.

EXCEPTION No. 61

—on Monday afternoon that Ethel Best had a baby-sitter and he and Ethel went to Janie Banks' house on Lawson Street; that they thought she had some money hid in the house; and that he and Ethel went with intent to take Janie's money. Britt stated they went to her house but could never get Mrs. Banks in a position to take the money, so they left and returned to I-80 Trent Court and let the baby-sitter go. He stated about 30 minutes later he and Ethel Best and the two children returned to the residence of Janie Banks. He stated, I believe, that—

Defendant objects. Objection overruled.

EXCEPTION No. 62

—he had a butcher knife in his pocket which he had brought from I-80 Trent Court; that Janie went in the kitchen and got some water and at this time he gave the knife to Ethel Best. He stated that Janie came back into the living room and sat down on the sofa; that she then got up to put some

wood in the stove; that at that time Ethel Best stabbed her in the back with the butcher knife. He stated the victim sat down in the floor and started hollering names that he didn't know; that at this time he took this black iron frying pan and struck victim over the head four or five times. He didn't remember exactly how many times he struck her. He stated that he and Ethel went in the victim's bedroom and searched through her bed and drawers and the pocket-books looking for money; that when they didn't find any they left and returned to I-80 Trent Court; that they stayed there a while; that he then carried Ethel Best and her children to stay with a friend on Lincoln Street. He then went to the Little Mint to work. After he got off work that night he went back to Lincoln Street and picked up Ethel and her children and returned to I-80 Trent Court where they spent the rest of the night.

CROSS EXAMINATION:

I arrived at the scene at about 4:45 p.m. on March 25th. I observed a crowd of about 25 persons in front of the house. I observed the body closely; then examined the house. All the windows and doors were locked except the front door and there were no signs of a forced entry into the house. I believe we never did find the key to the front door. No measurements were made as to the location of any objects in the living room. I believe I made a diagram of the living room in my notes.

The bedroom labeled "Janie's bedroom" on the black-board, contained two beds. The bed closest to the door to the living room appeared to have had the mattress turned up. Several blankets and quilts had been disturbed on it. Two pocketbooks had been emptied on top of the bed, and a whiskey bottle was on the bed. I do not recall if anything was under the bed. As to the other bed in the room, the mattress had been pulled up. There was a chest in the room, the drawers of which had been pulled out. Size of the room was about 7 feet wide by 10 feet long, roughly.

The room labeled as "Jason's bedroom" on the black-board diagram contained two beds. In that room, neither the beds nor anything else seemed to have been disturbed. Some men's clothes were lying on top of a bed. There is a door to that room from outside the house; I do not recall the type of locks on the door.

Behind that bedroom was the kitchen. There was a stove in the corner, and a table at the end of the kitchen as I recall. I believe there was a sink. I do not recall water fixtures which would indicate running water in the house. The back door from the kitchen to the outside had a nail on the inside of the door that was used for locking it. The nail was secured when I got to it.

The men's clothing I found in the bedroom consisted, I believe, of a man's pair of pants and a pull-over sweater. I would call them sport clothes, rather than work clothes.

I was at the house about one hour; then I went to Oscar's Mortuary, where I stayed about 20 or 25 minutes. I do not recall being present on that night when Mr. Bratcher talked to Jason Lewis.

I was off duty on the night of April 3rd and I was not present at the police station that night and have no knowledge as to what transpired there then.

In the Banks' house, other than the whiskey bottle and water glass, I dusted for fingerprints some pocketbooks found in the bedroom. No identifiable prints were found on the pocketbooks.

I lifted from the whiskey bottle which was on the bed in Janie's bedroom State's Exhibit No. 8, an identifiable print which has not been identified as belonging to any specific person.

I lifted State's Exhibit No. 9 from the water glass found in the chair in the living room to the left of the front door.

Mr. Bratcher did the remainder of the dusting done in the house. To my knowledge, nothing was dusted in the kitchen, nor in the bedroom adjacent to the kitchen, nor was anything dusted in the bedroom labeled as Janie's other than the pocketbooks and the whiskey bottle. I am not sure what Mr. Bratcher dusted in the living room.

DR. HENRY R. LITTLE Testified:

DIRECT EXAMINATION:

(Defense stipulated that the witness is an expert in the field of medicine and is licensed to practice and does practice medicine in North Carolina.)

On Wednesday, March 26, 1969, I viewed the body of

Janie Banks at Oscar's Mortuary in New Bern. I saw gross evidence of considerable traumatic blows about the head; there was a large depressed frontal fracture of the entire frontal skull. The skull was soft and layers of the scalp were peeled back in several places; there was a fractured skull and softening of the skull around the left ear.

There was a fracture of the left cheek bone. There were some small stab wounds or cut wounds about the lower mid-back and, I believe, the right wrist. The stab wound in the back was a little to the left of and on a line with the backbone.

There was some evidence that the body had been cleaned at the time I saw it, but I could see evidence of small amounts of blood; there was blood around the clothing and matted in the hair.

I have an opinion satisfactory to myself as to the cause of victim's death, and that opinion is that death was due to brain damage caused by repeated blows about the head with a blunt instrument.

CROSS EXAMINATION :

I did not perform a formal autopsy. I could palpate or feel the skull bones, but the brain itself was not visible.

REDIRECT EXAMINATION :

I probed the stab wound in the back of deceased Banks and found the wound to be horizontal, about an inch and a half in length and about half an inch deep. I probed it and ran into bone, which would be either a portion of the vertebrae off the spine or a rib coming from the spine. The blow inflicting that back wound did not hit any vital—

Defendant objects. Objection overruled.

EXCEPTION No. 63

—organ or anything of that sort,—

Defendant objects. Objection overruled.

EXCEPTION No. 64

—because its depth was only half an inch.

RECROSS EXAMINATION :

I could not say with any degree of medical certainty whether the stab wound in the back occurred before or after

death. The wound appeared to have been made at the same time that the other wounds were made, but there would be no way of determining with any degree of medical certainty whether the back wound was made before or after any other wounds.

ETHEL J. BEST Testified:

DIRECT EXAMINATION:

I am 23 years old. Janie Banks was my grandmama. I have known Charles W. Britt, Jr., since I was 19.

On Monday, March 24, 1969, I went to my grandmama's house.

Defendant objects. Objection overruled.

EXCEPTION No. 65

I was there on more than one occasion—

Defendant objects. Objection overruled.

EXCEPTION No. 66

—that day; I went twice. The first time was at about 3 or 3:15 in the afternoon. Charles Britt was with me. Charles knocked on the door and my grandmama came and opened the door and told us to come in. We went in and she was sitting on the sofa; Charles sat in one chair and I sat in another. We talked; Charles asked her for a glass of water, and she went to the kitchen and got the water and brought it back to him. In a few minutes, we left. She told me to come back a little later on; that she was going to get up some clothes for my children. Charles and I left and went back to my apartment at I-80 Trent Court. We stayed there for a few minutes with the children and went back to my grandmama's again.

Defendant objects. Objection overruled.

EXCEPTION No. 67

Charles knocked on the door again. That was about 5:30 p.m. We were there a few minutes and Charles asked her for another glass of water, and she soon went back toward the kitchen. She stayed a few minutes and stopped in her bedroom on her way back from the kitchen. Charles

said, "How come it's taking so long?" She got back with the glass of water. He drank some. She didn't sit back down, but went over by the heater and stooped down. The glass of water fell over or was knocked over. She kind of held her head up. Charles was smoking a cigarette and I thought he was going to put the cigarette duck in the heater but he stabbed her in the back with the knife, and she said, "Oh." I jumped up and grabbed my children and told him I was going to leave.

Defendant objects. Objection overruled.

EXCEPTION No. 68

He told me I better not leave or he was going to kill me.

Defendant objects. Objection overruled.

EXCEPTION No. 69

I told him I didn't know he was going around there to kill my grandmama. He threw the knife down on the floor and put his arm around her mouth so she couldn't holler, and grabbed an iron poker beside the heater. He beat her in the back and across the shoulder and beat her down to the floor. Then he went out of the front room toward the kitchen and came back in with this frying pan here. Just as he got back in the front room, she had started to get up; she was trying to make it up off the floor. He started beating her with the frying pan. He beat her until he beat her brains out.

Defendant objects and moves to strike.

Objection and motion overruled.

EXCEPTION No. 70

He ransacked some pocketbooks and turned the mattress back, but he didn't find any money while I was there; so he said he did all of that and he didn't find any money. When he came back in the front room I told him I was ready to go because I was scared, and he said he knew I was scared because that was the first time I have seen anything done like that. He told me again I better not go anywhere or tell anybody, or else he would kill me. I had to stay there because I was scared and if I had left I know he would have killed me. We were there the second time until about 6:15 or 6:30, because when the killing was going on—

Defendant objects. Objection overruled.

EXCEPTION No. 72

—the six o'clock news was on.

Charles shut the door when we left, but before we got to the corner, he told me to go on home, that he was going back to the house. I went home to I-80 Trent Court. He got home about a half hour after I did. He said he went back to grandmama's and pulled off her sweater and threw it behind the bed, so nobody could find any fingerprints. And he said he went back there and finished killing her.

Charles stayed at my place the rest of that night. Next morning, he said he was going to take me over to Lincoln Street; that he had to go to the Little Mint for something and he didn't want to leave me alone, because he thought maybe I would tell and he didn't want me to tell it and that's why he took me over there.

Defendant objects. Objection overruled.

EXCEPTION No. 73

He told me to stay there until he came back, so I did. It was my cousin's house that I went to on Lincoln Street.

I recognize this knife. (State's Exhibit No. 1). It is mine; I bought it downtown at McLellan's.

Mr. Bratcher talked to me about this matter several times. The first time, Mr. Bratcher and Mr. Dowdy came to my apartment and wanted me to go down to the police station. Another time was when I was at the Little Mint in Charles' brother's car which Charles was driving. On another occasion, Mr. Bratcher talked with me on the Thursday morning following Charles' arrest on Wednesday. On one occasion, Mr. Bratcher and Detective Dowdy took Charles and me to the police station, where we all were together in the same room.

Mr. Bratcher came to my apartment with ladies from the Welfare Department to make arrangements about the children—

Defendant objects. Objection overruled.

EXCEPTION No. 74

—about looking after the children—

Defendant objects. Objection overruled.

EXCEPTION No. 75

—and they were going—

Defendant objects. Objection overruled.

EXCEPTION No. 76

—to take custody of my children, but my daddy said he—

Defendant objects. Objection overruled.

EXCEPTION No. 77

—would look after them. On that day, a Friday, after Mr. Bratcher and Mr. Dowdy had talked to me alone, they took me to the jail and we talked in the presence of Charles. At that time, Charles accused me of stabbing my grandmama in the back.

Defendant objects. Objection overruled.

EXCEPTION No. 78

I told him—

Defendant objects. Objection overruled.

EXCEPTION No. 79

—I didn't do it.

Defendant moves to strike. Motion overruled. Defendant excepts.

EXCEPTION No. 80

I told the officers—

Defendant objects. Objection overruled.

EXCEPTION No. 81

I told Mr. Bratcher that I didn't stab my grandmama in the back with the knife.

Defendant moves to strike. Motion overruled.

Defendant excepts.

EXCEPTION No. 82

Concerning the knife—

Defendant objects. Objection overruled.

EXCEPTION No. 83

I told him the knife came from my apartment.

Defendant moves to strike. Motion overruled.

Defendant excepts.

EXCEPTION No. 84

CROSS EXAMINATION:

My children are aged 4 and 2. I am not and never have been married.

I am under indictment, charged with Charles, for murder of my grandmother.

The last time I talked to Mr. Bratcher about this case was the Friday when they arrested me.

I have talked to Mr. Hamilton about testifying today. He and my lawyer and I got together on it and we talked about it, about a week or so ago.

Q. The whole point is that you're trying to say Charles did it and get yourself out of the trouble, isn't it?

A. Well, look I was there.

Q. Isn't that what you are trying to do, aren't you trying to get yourself out of trouble?

A. I was told to come up here and testify and that's what I am doing. If I hadn't been told to come up here I wouldn't be up here.

Q. But you are still trying to get yourself out of trouble, aren't you?

A. Trying to get myself out of trouble? I'm just doing what I was told to do.

MR. BOWERS: Come down.

MR. HAMILTON: The State rests if it pleases the court.

COURT: Any evidence for the defendant?

MR. HAMILTON: In view of the questions asked by the attorney for the defendant the State is willing to stipulate at this time that the solicitor for the State told the last witness that he would not prosecute her in this case.

COURT: Will there be evidence for the defendant?

MR. BOWERS: No, sir, at this point, your Honor, at the conclusion of the prosecution's case in chief, the defendant moves: 1. For judgment as of nonsuit; 2. To dismiss the indictment for failure to establish a prima facie case as a matter of law, and 3. To dismiss the indictment for failure to prove defendant's guilt beyond a reasonable doubt.

COURT: Each motion is overruled and denied.

MR. BOWERS: The defendant excepts. We offer no evidence and rests and renews the motions at the end of all evidence.

COURT: Each motion is overruled and denied.

MR. BOWERS: An exception, your Honor.

EXCEPTION No. 86

Mr. Hamilton began his summation to the jury and the following was objected to:

"The only evidence is when this man told the police about using her own knife to stab her grandmother;"

Objection Overruled

"That's the only explanation offered, the only statement that he made concerning this knife, that he had anything to do was when he picked it up and threw it back down on the floor.

MR. BOWERS: I object to the solicitor's comment on the witness' failure to take the witness stand, directly or indirectly."

CHARGE TO THE JURY

Ladies and gentlemen of the jury, this is a criminal action in which the defendant Charles W. Britt, Jr., is charged in a bill with the capital crime of murder in the first degree of Janie Banks, it being alleged in the bill of indictment that the offense was committed on March 24, 1969.

The defendant has entered a plea of not guilty and upon his plea he is presumed innocent. The burden of proof is upon the State to satisfy you on the evidence and beyond a reasonable doubt of the defendant's guilt.

A reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt arising out of the evidence or lack of evidence, or from its deficiency. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. If after considering, comparing and weighing all the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not.

A reasonable doubt as that term is employed in the admin-

istration of the criminal law is an honest substantial misgiving, generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. It is not a doubt suggested by the ingenuity of counsel nor by your own ingenuity not legitimately warranted by the testimony nor is it one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law nor one prompted by sympathy for him or those connected with him.

The State has offered evidence which it contends tends to show that Janie Banks lived on Lawson Street here in New Bern; that she lived alone most of the time but that her grandnephew roomed there at times; that her body was found on March 25th about 4:30 in the afternoon on the floor of her living room and that officers were called and soon thereafter arrived and made an investigation concerning her death.

The State contends that shortly thereafter the defendant was interviewed by police officers of the City of New Bern, and that he was interviewed again, as I recall, first on March the 29th and then on April the 2nd. The State contends that each time he was interviewed by the officers that one of them, Mr. Bratcher, gave him information concerning his constitutional rights to remain silent and to have counsel and other such warnings as the State contends were given; that the defendant at first said that he had been to the house of Janie Banks on March 24th with her granddaughter and that they stayed a short while and the Little Mint restaurant and came to the police station, and that the officer told the defendant at that time that he had a report from the SBI concerning a fingerprint and let the defendant read it, and asked him then if he had anything to say about the knife in the home of Janie Banks, and that the defendant said at that time that he did see a knife on the floor and picked it up to put it in the stove and changed his mind and put it back on the floor; that the defendant was then put in custody and the following night requested or that Mr. Bratcher received a call to come to the jail and that he did, and that the defendant talked to him further that night about the charge.

The State contends that the defendant told Mr. Bratcher that he had gone with Ethel Best and that after they had

left and picked up her children, that they went back to her house; that he had carried the knife or a knife to her house, to Janie Bank's house, and that she went out in the room; that he gave the knife to Ethel Best, and that when she was, that is when Janie Banks went to put some fuel on the fire that Ethel Best struck her in the back with a knife; that she sat down on the floor and screamed and called names that he had never heard before and that Ethel got the frying pan from the kitchen and gave it to him and he hit her over the head with it several times.

The State contends, however, that the defendant, that the evidence favorable to it tends to show that the defendant was there on two occasions on Monday afternoon and that he was with Ethel Best. The State contends, however, that on that afternoon that Ethel Best did not know he had brought a knife from her house or her apartment and that the defendant struck her with the knife and got the frying pan and beat her across the head; that he would not let Ethel Best go when she wanted to leave but left with her later and told her he was going back to finish killing her or words to that effect and that he did go back. The State contends that that the blows on her head were sufficient to cause death and did in fact cause death and the State contends that irrespective of who struck her with the knife, the State contends that the defendant did, in fact, strike her in the head with the frying pan and that he is the one who caused her death.

The State contends further that the left thumbprint of the defendant was, in fact, found in the curve of the knife as it was found in a bent condition, and that some other fingerprints were found but were not identified and that the only print that could be identified was the one found on the knife and the State contends it was the defendant's fingerprint.

The State further offers evidence which it contends tends to show that the defendant after the alleged attack on Janie Banks, searched her bedroom or looked in her bedroom in an effort to find some money; that he was not successful in doing so and made the comment, so the State contends to Ethel Best later that he had gone to a lot of trouble and done quite a bit for nothing because he had not been able to find any money.

So, the State contends members of the jury, that the defendant, his real purpose in, that he did in fact strike her and that his real purpose was in an effort to get some money from her which he was not successful in doing but the State contends that he did with premeditation and deliberation and with malice kill Janie Banks.

Now, the defendant has elected not to testify as a witness in his own behalf. I instruct you, however, that the statute relating to that circumstance provides that in the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, the person so charged is at his own request but not otherwise a competent witness and his failure to make such request shall not create any presumption against him. Therefore, I instruct you that the defendant's failure to request that he testify as a witness in his own behalf shall not create any presumption against him.

The defendant contends, however, that you should have a reasonable doubt as to his guilt and the defendant contends that if you find that he committed any act against her that you should not find that it caused her death or that if you should find that he did cause her death, that you should not find that he did so with malice or with premeditation and deliberation.

The defendant contends that the evidence of the State is insufficient in many respects to justify any finding against him. He contends that you should not rely on the memory of either or both of the officers as to what was said or what they saw or anything that occurred back in March and early April of 1969. He contends that it would be unreasonable for him to have gone to Janie Bank's home to harm her when he was with her granddaughter. He contends that had he intended to hurt her it would not have been necessary for him to have told Ethel or to have taken her with him. He further contends that other people, that you should find from the evidence and that the evidence and that the evidence discloses that other people had access to her home; that other people had been in her home; that there's an uncertainty as to whether she was actually killed or when she died. The defendant contends that there's no assurance from the evidence in the case that she died on Monday afternoon or Monday morning or Monday night or Tuesday. The

defendant contends that you would have to deal in speculation to determine not only how she was killed but when she was killed and who killed her.

The defendant contends that even if his fingerprint was found on the knife that he didn't use it as against her. He contends that simply touching a knife, if he did in fact touch it, is of no legal significance or factual significance. So he contends members that he had, members of the jury that he had a job; that he was working at the Little Mint; that he had no reason to steal or attempt to steal any money from Janie Banks and that if he intended to steal money from her that it would have been no reason for him to kill her in order to do so; so he contends members of the jury that you should have a reasonable doubt as to his guilt and that you should acquit him.

It is a question of fact for you to determine from the evidence in the case. I have only briefly and very briefly summarized the evidence. It is your duty, however, to remember all of the evidence. The law requires the trial judge to state only so much evidence as is necessary to explain and apply the law arising upon the evidence. It is your duty, however, to remember all the evidence and to find the fact from the evidence as you recall and understand it to be.

If your recollection of the evidence is in conflict with counsel or counsel for the defendant or the solicitor, then you'll be guided by your own recollection for the reason that you are the sole triers of the fact.

Now, ladies and gentlemen of the jury, the statute, general statutes relating to the charge of murder provides that a murder which has been perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing shall be deemed to be murder in the first degree and shall be punished with death, provided, if at the time of rendering its verdict in open court the jury shall so recommend, the punishment shall be imprisonment for life in the State's Prison and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree.

Now, the statute uses the expression that any other kind of wilful, deliberate and premeditated killing shall be

deemed to be murder in the first degree. Now, in construing that language our Supreme Court of North Carolina has said that murder in the first degree is the unlawful killing of a human being with malice, and with premeditation and deliberation. The intentional killing of a human being with a deadly weapon implies malice and if nothing else appears constitutes murder in the second degree. The additional elements of premeditation and deliberation necessary to constitute murder in the first degree are not presumed from killing with a deadly weapon. They must be established beyond a reasonable doubt and found by the jury before a verdict of murder in the first degree can be rendered against the prisoner.

Premeditation means thought beforehand for some length of time, however short. Premeditation means to think beforehand and when we say that the killing must be accompanied by deliberation and premeditation it is meant that there must be a fixed purpose to kill which preceded the act of killing for some length of time, however, short, although the manner and length which, length of time which the purpose is formed is not material, if however, the purpose to kill is formed simultaneously with the killing, then there is no premeditation and deliberation and in that event the homicide would not be murder in the first degree.

Deliberation means that the act is done in a cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable time, but it means an intention to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of violent passion suddenly aroused by some lawful or justifiable or legal provocation.

Now, the expression cool state of blood: as to that court has said that although there may have been time for deliberation, if the purpose to kill was formed immediately and executed in a passion, especially if the passion was aroused by a recent provocation or mutual combat, then the murder is not deliberated and premeditated. However, passion does not always reduce the crime since a man may deliberate, may premeditate and may intend to kill after premeditation and deliberation, although prompted to a large extent and

to a large extent controlled by passion at the time; if the design to kill was formed with deliberation and premeditation it is immaterial that the defendant was in a state of passion or excited when the design was carried into effect.

Now, premeditation and deliberation are not usually susceptible of direct proof and are therefore susceptible of proof by circumstances from which the facts sought to be proven may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: 1. Of provocation on the part of the deceased. The conduct of the defendant before and after the killing; threats and declarations of the defendant before and during the course of the occurrence, giving rise to the death of the deceased, and the dealing of lethal blows after the deceased had been felled and rendered helpless.

So, members of the jury, the elements of premeditation and deliberation are, of course, necessary elements of the crime of murder in the first degree. Also malice is a necessary element.

(Our court has said that malice is not only hatred, ill will or spite as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse or justification. It may be shown by evidence of hatred, ill will or dislike and malice is implied in law from the intentional killing with a deadly weapon. Malice is expressed, that is malice may be expressed or it may be implied. Malice is expressed when a person wilfully and deliberately and with a fixed purpose intentionally and unlawfully kills another. Malice is implied where an act dangerous to another is done so recklessly and wantonly as to evidence depravity of mind and disregard of human life. Malice may arise either from ill will or grudge. It also may be said to exist when there has been a wrongful, intentional and unlawful killing of a human being without lawful excuse or mitigating circumstances.

Now, as I just said a moment ago the intentional killing of a human being with a deadly weapon implies or rather creates a presumption, first: that the killing was unlawful and second: that it was done with malice. That presump-

tion, however, does not arise unless the killing is done with a deadly weapon.

Now, a deadly weapon is any instrument which according to the manner of its use is likely to produce death or serious bodily harm. Of course, a frying pan is not, in law, a deadly weapon. It is not designed as a weapon; however, it is for you to determine whether it was in fact, whether a frying pan was in fact used in such a manner as to likely produce death or serious bodily harm. If it was so used then it would be a deadly weapon according to the manner of its use. If it was not so used then, of course, it would not be a deadly weapon. Notwithstanding how you find as to that it's still a question for you to determine as to whether the defendant committed the homicide alleged and if so whether he did so with malice and with premeditation and deliberation. If the defendant caused the death of Janie Banks, that is to say if he killed her by beating her in the head with a frying pan but if he did so without malice, of course, he could not be guilty of murder in the first degree, or if he did so with malice but without premeditation and deliberation, he could not be guilty of murder in the first degree. On the other hand irrespective of whether you determine a frying pan, from the evidence in this case, to be a deadly weapon, if you find from the evidence and beyond a reasonable doubt that the defendant did, with malice and with premeditation and deliberation intentionally kill Janie Banks, then that would constitute a finding of guilty of murder in the first degree. Otherwise it would not.

Now, it is not necessary for one to premeditate any particular length of time nor to deliberate any particular length of time concerning the killing of another human being. It is necessary, however, that there be a fixed design to kill purposely formed, deliberated upon for some period of time, however short, before the actual killing and if there is a fixed purpose to kill but if it is formed simultaneously with the killing, then that does not constitute premeditation and deliberation.

Now, members of the jury, if you find from the evidence and beyond a reasonable doubt that either the defendant or Ethel Best struck Janie Banks in the back with a butcher knife and rendered her helpless by doing so, and if you should further find from the evidence and beyond a reason-

able doubt that the defendant thereafter struck her about the head with a frying pan with sufficient force and a sufficient number of times to cause her death and that he had a specific intent to kill, and that such intent was formed before the actual killing, and that he had premeditated and deliberated upon his act for some period of time preceding the act of killing, then it would be of no consequence, no legal consequence, that is as to who actually inflicted the knife wound on her back.

Now, as to that the State contends that the defendant inflicted all wounds on her but that even if you should find that Ethel Best struck her with a knife, the State contends that the defendant then was aware that she was helpless to do anything to him or to prevent him from stealing if he wanted to steal something from her place or that she was helpless to do anything to prevent him from doing whatever he wished to do. So the State contends that seeing her in that condition, notwithstanding how she got in that condition that that is a circumstance that you should consider in passing upon the question of whether there was premeditation and deliberation. The State contends that he dealt lethal blows to her after she had been felled and rendered helpless; that his declarations were such that is to show a fixed design to kill. The State contends that he came prepared to kill; that he brought a knife from Ethel Best's apartment for that very purpose and that when he saw that the knife wound had not had the desired effect that he beat her over the head until she was dead; that after he left her place that he went back to make sure she was dead. So, the State contends members of the jury that the circumstances are such as to justify a finding that the killing of the deceased was accompanied by malice and as a result, of premeditation and deliberation.

The defendant contends that you should not so find. He contends it was not his knife that has been offered in evidence and that even according to Ethel Best that the knife belonged to her. He contends that he had no reason to take a knife from Ethel Best's apartment to carry it to Janie Banks' home and that you should not find that he did so. He contends that he had no reason to strike her or to knock her in the head with a frying pan or to do anything else to her. He contends that others had far greater oppor-

tunities even if you should find that he was at her place, though he contends that you should have a reasonable doubt as to that. He contends members of the jury that you should not rely on what Ethel Best says; that Ethel Best was charged with murder in the first degree. The solicitor has said that he will not prosecute her; so the defendant contends that she is saying whatever is necessary to persuade the solicitor's office not to prosecute her on the murder charge. So, the defendant contends ladies and gentlemen of the jury that you should not believe Ethel Best and that you should not give full weight to the testimony of the officers based upon their recollection of what may have been said or that if you should find as he contends that he made statements to the officers or to either of them which indicated that he told, that he had some connection with the death of Janie Banks, he contends that you should not find that it was true; that notwithstanding what he may have said he contends that there's nothing to justify a finding that he did, in fact, do anything to cause her death.

However, the State contends that you should believe Ethel Best. The State contends that there's no reason to prosecute her when all the evidence is to the effect that the defendant is the only guilty party and that for that reason the solicitor elected not to prosecute her.

So the State contends members of the jury that you ought to believe her and the defendant contends you should not. However, it's a question for you to determine from the evidence as you recall and understand it to be.

If upon a consideration of all the evidence the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant with premeditation and deliberation or as a result of premeditation and with malice, killed Janie Banks, then it would be your duty to, well, let me correct that, please: that would constitute a finding of guilty of the charge of murder in the first degree. If it has failed to so satisfy you, you would not convict him of murder in the first degree but would acquit him of that and consider his guilt or innocence of murder in the second degree.

As I said murder in the second degree is the unlawful, intentional killing of a human being with malice but without premeditation and deliberation. So if the defendant in-

tentionally killed Janie Banks and if it was done, that is if it constituted a wrongful, intentional and unlawful killing without lawful excuse or mitigating circumstances, or as a result of hatred, ill will or spite, then that would constitute a finding of malice or would constitute malice rather.

Now, I've used the expression intentional killing both as to murder in the first degree and murder in the second degree. There is some difference in the meaning, however, as it is applied to those two separate degrees of murder. An intention to kill or an intentional killing as used in the charge of murder in the first degree means a specific intent to kill, whereas murder in the second degree, and intentional killing, means an intent to inflict the injury which did in fact cause death. Therefore, if the defendant is acquitted of the charge of murder in the first degree and if he was without a specific intent to kill Janie Banks, but did intentionally inflict wounds on her which, in fact, caused her death, then as to that that would constitute an intentional killing and if the defendant did inflict wounds upon her and intentionally did so and if those wounds produced her death and if he did so with malice, then that would constitute murder in the second degree and if you find that the defendant struck her on the head with the frying pan that has been offered in evidence and that he used it in such a manner as to constitute it a deadly weapon, then there would be a presumption that the killing was unlawful and that it was done with malice, and an unlawful killing with malice is murder in the second degree. If you fail to find that the defendant struck her with a frying pan that was offered in evidence, then, of course, or if you fail to find that, or if you find that he did strike her with the frying pan that was offered in evidence but fail to find that it was used as a deadly weapon, then no presumption would arise.

Now, members of the jury, if the defendant unlawfully and with malice killed Janie Banks, and if you should so find from the evidence and beyond a reasonable doubt it would be your duty to return a verdict of guilty of murder in the second degree. If you have a reasonable doubt as to his guilt of that you would acquit him of that charge, in which he, event you would consider his guilt or innocence of manslaughter.

Manslaughter is the unlawful killing of a human being

without malice and without premeditation and deliberation. So, if you should find from the evidence and beyond a reasonable doubt that the defendant unlawfully killed Janie Banks but fail to find from the evidence and beyond a reasonable doubt that he did so with malice as I have defined that then that would constitute a finding of guilt of manslaughter.

He contends members of the jury that he had no malice against her; he contends that there is no evidence that he had ever seen her before that day. He contends that he had no ill will against her. He further contends that it was, that he had no desire to steal from her or to rob her or to take money or anything else from her place. He contends that if you should find that he did, in fact, inflict the wounds upon her which caused her death, that you should not find that he did so with malice. He contends, of course, that you should not find that he inflicted any wounds on her or had had anything whatever to do with her death. He contends that you should have a reasonable doubt as to that but that if you find that he did have anything to do with her death you should not find, so he contends that he did so with malice.

The State contends on the other hand members of the jury that you should not come to consider manslaughter or even second degree murder but if you do that you should find that the defendant was prompted by malice, if not ill will against her, and it is malice so the State contends to show complete disregard of human life; that it was a wrongful, an intentional and deliberate act, and so the State contends that there were no mitigating circumstances; that there was no provocation; that Janie Banks had made no threat against him or done him any harm or attempted to do so; so the State contends members of the jury that the conduct of the defendant such as it was and whatever you find it to have been was prompted by malice.

Now, if the State has failed to satisfy you from the evidence and beyond a reasonable doubt that the defendant unlawfully killed Janie Banks, then it would be your duty to return a verdict of guilty of manslaughter. If you have a reasonable doubt as to that then it would be your duty to return a verdict of not guilty.

So, members of the jury, you may return one of the fol-

lowing verdicts, depending upon how you find: either guilty of murder in the first degree, or guilty of murder in the first degree with a recommendation at the time of returning your verdict that the defendant's punishment be imprisonment for life in the State's prison, or guilty of murder in the second degree or guilty of manslaughter, or not guilty.

Now, the portion of the statute that I read to you at the outset relating to punishment for murder in the first degree provides that murder in the first degree shall be punished by death, provided if at the time of rendering its verdict in open court the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. So in obedience to this statute I instruct you that prior to the enactment of this statute which I have just read the punishment for the crime of murder in the first degree was death and a recommendation by a jury had no legal effect.

Now, I charge you that under this statute a recommendation by the jury in open court at the time of rendering its verdict of the prisoner convicted of murder in the first degree, that his punishment shall be imprisonment in the State's prison for life instead of death, has the legal effect of reducing the punishment from death to life imprisonment in the State's prison.

I charge you, therefore, that the statute vests in the trial jury the unrestrained, discretionary right to mitigate the punishment of one convicted of the crime of murder in the first degree from death to life imprisonment in the State's prison by recommending in open court at the time of rendering its verdict that the punishment shall be imprisonment for life in the State's prison, and I instruct you further if you should find from the evidence in the case and beyond a reasonable doubt that the prisoner committed acts sufficient to constitute the crime of murder in the first degree and should not elect in your own unrestrained, discretionary, discretion that his punishment should be reduced from death to life imprisonment, then you would return a verdict finding the prisoner guilty of murder in the first degree without any recommendation that his punishment be imprisonment for life in the State's prison instead of death. On the contrary, however, if you should find beyond a reasonable doubt from the evidence that the prisoner com-

mitted acts sufficient to constitute murder in the first degree, and should find him guilty of murder in the first degree, and should you elect in your unrestrained discretion that his punishment should be reduced from death to life imprisonment, then your verdict would be guilty of murder in the first degree with a recommendation that the prisoner's punishment be imprisonment for life in the State's prison instead of death.

So, members of the jury it's a question for you to determine from the evidence as you recall and understand it to be from the facts as you find the facts to be from the evidence in the case, when considered in the light of the law as I have attempted to explain it to you. Nothing that I have said or done or any ruling that I have made during the progress of the trial should be considered by the jury as an expression or an intended expression of opinion as to what your verdict should or should not be. It's a matter entirely for you to determine from the facts as you find them to be and the law as I have explained it to you.

So, members of the jury, upon a consideration of the evidence if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant unlawfully and intentionally, and with malice and premeditation and deliberation killed Janie Banks, then you would return one of the following verdicts: guilty of murder in the first degree, or guilty of murder in the first degree with a recommendation that the prisoner's punishment be imprisonment for life in the State's prison instead of death. If the State has failed to so satisfy you from the evidence and beyond a reasonable doubt that the defendant is guilty of murder in the first degree you would acquit him of that and then consider his guilt of murder in the second degree or his innocence of that. If you come to consider that question and if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant unlawfully and with malice killed Janie Banks you would return a verdict of guilty of murder in the second degree; if you have a reasonable doubt as to his guilt of that offense you would acquit him of that in which event you would consider his guilt or innocence of manslaughter. If you come to consider that question and if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant unlaw-

fully killed Janie Banks you would return a verdict of guilty of manslaughter. If the State has failed to so satisfy you as to that charge or if upon a consideration of the evidence you have a reasonable doubt as to his guilt you would return a verdict of not guilty.

Well, let me say this to you, one further thing ladies and gentlemen: when you return with your verdict the clerk will call the roll of the jurors and ask which of you, which juror will speak for the jury; therefore, while you're in the jury room and before you return with your verdict agree on who will announce the verdict for you. The 13th juror may now be excused as the jury goes to the jury room. You need not go in with them. All right, you may retire.

EXCEPTION No. 89

(The jury retired at 4:15 o'clock p.m., and the jury returned to the courtroom at 5:17 o'clock p.m., and the following occurred:)

COURT: You may take the verdict.

CLERK: Stand up, please. Ladies and gentlemen of the jury, answer to your names, Mrs. F. W. Riggs, (all jurors answered) Thomas Eborn, C. W. Daugherty, Wesley Land, Franklin Taylor, Mrs. J. R. Hobson, Charles White, William A. McKay, Jacob Grace, Margaret Willis, Maggie Hartley, Mrs. Dan Hartsell, have you all agreed on your verdict?

JURORS: We have.

CLERK: Who will speak for you?

JUROR: I will.

CLERK: Charles W. Britt, stand' up, and hold up your right hand, ladies and gentlemen of the jury, look upon the prisoner, what say you is he guilty of the felony of murder—

COURT: Just say how do you find?

CLERK: How do you find the defendant?

JUROR: Guilty of second degree murder.

CLERK: Guilty of second degree' murder; ladies and gentlemen of the jury you return as your verdict and the court recordeth that Charles W. Britt is guilty of second degree murder, so say you all?

JURORS: Yes.

COURT: Thank you. (Jury departs) Do you have anything to say?

MR. BOWERS: Could we have until tomorrow morning on this?

COURT: Yes, ladies and gentlemen, the clerk will mail you a check in a few days. All right, sheriff he's in your custody.

(The court, then at 5:25 o'clock recessed until 9:30 o'clock, Thursday, December 18, 1969.)

MORNING SESSION

COURT: Anything further?

MR. BOWERS: Your Honor, I know your Honor has read it but I would like for you to read the psychiatric report.

COURT: As I understand it was relatively good.

MR. BOWERS: May we call his mother around.

COURT: Yes.

(Lola Frances Gibson, mother of the defendant testifies in mitigation)

Anything further?

MR. BOWERS: I think that's all, your Honor. Just for the purpose of refreshing your recollection, he was turned to stand trial as a mental retardation but not psychotic.

COURT: All right, stand up Charles: the judgment of the court is that the defendant be confined to the State's prison for a term of 30 years (thirty).

MR. BOWERS: Your Honor, of course, we move to set the verdict aside and we would, of course, move for a new trial and upon your Honor's denial of such motion we give notice of appeal to the Court of Appeals.

COURT: All right, give the defendant 60 days and the State 20; let the commitment show that a bond is set in the sum of \$25,000.00 appearance bond. Let the commitment show that he is to be transferred to the custody of the Department of Corrections pending the appeal unless he gives the appearance bond or otherwise discharged as by law provided, and if he doesn't get relief on the appeal he'll be given credit on that time.

MR. BOWERS: You want us to prepare an order for the transcript?

COURT: Mr. Hood will do that, he has the proper form.

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

Appellant herein assigns as error the following as violating his rights under the Constitutions of the United States and of this State:

1. The court erred in refusing to grant the appellant's motion for a transcript of the evidence and testimony in the prior trial which ended in a mistrial.

EXCEPTION No. 87 (R p 13)

2. The court erred in admitting into evidence a purported, oral confession supposedly given at the police station without benefit of counsel or corroboration.

EXCEPTIONS Nos. 29, 30, 31 and 32 (R pp 28, 30, 34)

3. The court erred in refusing to allow the appellant's motion *In Limine*.

EXCEPTION No. 88 (R p 15)

4. The court erred in admitting into evidence latent fingerprint lifts.

EXCEPTIONS Nos. 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 45, 46 (R pp 26, 27, 28, 39)

5. The court erred in admitting fingerprint testimony when there was evidence that the fingerprints of the defendant could have been placed at the scene at a time other than the time of the commission of any crime.

EXCEPTION No. 88 (R p 15)

6. The court erred in admitting fingerprint testimony when it appeared that there was at least one other fingerprint of another person at the scene which could not be accounted for.

EXCEPTION No. 88 (R p 15)

7. The court erred in failing to instruct the jury that the indictment against the defendant is no evidence of guilt and carries no presumption of guilt.

EXCEPTION No. 89 (R p 78)

8. The court erred in failing to instruct the jury while it is the duty of a juror to discuss and consider the opinions of the other jurors, he must decide the case upon his own

opinion of the evidence, and upon his own judgment and conscience.

EXCEPTION No. 89 (R p 78)

9. The court erred in failing to instruct the jury that the defendant is entitled to every inference in his favor which can be reasonably drawn from the evidence, and where two inferences may be drawn from the same facts, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence.

EXCEPTION No. 89 (R p 78)

10. The court erred in failing to instruct the jury that the presumption of the defendant's innocence is not an idle phrase to be taken lightly by the jury; but it must be borne in mind by the jury that it is an important right belonging to every person accused of crime.

EXCEPTION No. 89 (R p 78)

11. The court further erred in failing to charge the jury that such presumption of innocence continued throughout the trial and jury's deliberation, until overcome by evidence, and evidence alone, to the exclusion of all reasonable doubt.

EXCEPTION No. 89 (R p 78)

ROBERT G. BOWERS

*Appointed Counsel for Defendant,
Charles W. Britt, Jr.*

E. LAMAR SLEDGE

*Appointed Counsel for Defendant,
Charles W. Britt, Jr.*

STIPULATION

IT IS STIPULATED by and between the parties through their respective counsel that the foregoing shall be and will constitute the record and the case on appeal and that the same was duly served in apt time.

ROBERT G. BOWERS

*Appointed Counsel for Defendant
New Bern, North Carolina*

E. LAMAR SLEDGE

*Appointed Counsel for Defendant
New Bern, North Carolina*

LUTHER HAMILTON, JR.
Solicitor
Morehead City, North Carolina

CLERK'S CERTIFICATE

I, Dorothy Pate, Clerk of the Superior Court in and for Craven County, do hereby certify that a regular session of the Superior Court Division in the said county was held in April, 1969, and the Grand Jury, which was properly formed, returned a true bill against Charles W. Britt, Jr., a copy of which is the foregoing case on appeal; that a regular session of said court was held in November, 1969, and the Honorable George M. Fountain was presiding judge; that the case of State against Charles W. Britt, Jr., was tried before Judge Fountain and a duly constituted and impaneled jury, and the same ended in a mistrial; and that a regular session of the said court was held in December, 1969, and Judge Fountain was, again, presiding; that case of State vs. Charles W. Britt, Jr., was tried before Judge Fountain and a duly constituted and impaneled jury, and the verdict rendered that the defendant was guilty and the judgment rendered thereon appears in the record.

That the defendant gave notice of appeal in open court to the Court of Appeals of North Carolina, in forma pauperis, and the case on appeal is transmitted herewith.

Witness my hand and official seal, this the 13th day of March, 1970.

MARY P. McLAWHORN
Assistant Clerk of the
Superior Court

(SEAL)

COURT OF APPEALS OF NORTH CAROLINA.

STATE OF NORTH CAROLINA

v.

CHARLES W. BRITT, JR.

No. 703SC270.

May 27, 1970.

Certiorari Denied July 31, 1970.

The defendant was tried upon a bill of indictment charging him with murder in the first degree of Janie Banks.

The evidence for the State tended to show that the defendant went to the home of Janie Banks on 24 March 1969 and stabbed her in the back with a knife. Then "(h)e threw the knife down on the floor and put his arms around her mouth so she couldn't holler, and grabbed an iron poker beside the heater. He beat her in the back and across the shoulder and beat her down to the floor. Then he went out of the front room toward the kitchen and came back in with this frying pan here. Just as he got back in the front room, she had started to get up; she was trying to make it up off the floor. He started beating her with the frying pan. He beat her until he beat her brains out." Thereafter, the defendant ransacked the house before leaving. The defendant offered no evidence.

The defendant, an indigent, was represented at the November, 1969 trial, at the December 1969 trial, and on this appeal by the same two attorneys who were appointed on 3 June 1969 to represent him.

The first trial ended in a mistrial on 14 November 1969 when the jury could not agree on a verdict.

The second trial ended on 18 December 1969 after the jury had found the defendant guilty of murder in the second degree and the court had sentenced him to the State Prison for a term of thirty years.

Defendant, in apt time, gave notice of appeal.

Atty. Gen. ROBERT MORGAN and Staff Atty. CHRISTINE Y. DENSON, Raleigh, for the State.

ROBERT G. BOWERS and E. LAMAR SLEDGE, New Bern, for the defendant appellant.

MALLARD, Chief Judge.

On this record, the defendant entered 89 exceptions. In his assignments of error, he refers to only 26 of them. The other 63 are deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals. These 26 exceptions are considered under the five questions presented on this appeal.

1. Defendant asserts that the trial judge committed error in refusing to order that the defendant be furnished with a transcript of the first trial. The only reason asserted by the defendant in his motion for a transcript was that because a non-indigent defendant could purchase a transcript, that he, an indigent, was entitled to a transcript of the evidence and testimony given at the first trial which resulted in a mistrial. He does not allege that the court reporter who took the evidence at the first trial was not available to him as a witness. He was represented at both trials by the same lawyers. *Forsberg v. United States*, 351 F.2d 242 (9th Cir. 1965). The second trial took place about a month after the first trial. There was no showing that the cross-examination by the defendant of the State's witnesses was restricted in any way. There was no argument by the solicitor relating to discrepancies in the testimony as there was in *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2d Cir. 1969). The defendant had the right to use the court reporter if there was a conflict in the State's testimony. We think that the cases cited by the defendant in support of his contentions are distinguishable.

It the case of *Nickens v. United States*, 116 U.S.App.D.C. 338, 323 F.2d 808 (1963), cert. den., 379 U.S. 905, 85 S.Ct. 198, 13 L.Ed.2d 178 (1964), the Court said:

"There is no absolute right to have the transcript of a prior trial against the contingency, now urged, that some witness at the second trial may give inconsistent testimony. Any inconsistency in testimony arising at the second trial could readily be dealt with by calling the reporter of the prior trial to read the earlier testimony. Appellant had the same counsel at both trials. The District Court did not abuse its discretion in deny-

ing appellant's bare demand for a transcript in these circumstances."

We are of the opinion and so hold that the factual situation here does not reveal such a need for the transcript of the evidence at the first trial that the denial thereof was a deprivation of a basic essential of the defendant's defense. *State v. Keel*, 5 N.C.App. 330, 168 S.E.2d 465 (1969).

2. Defendant asserts that the trial judge committed error in refusing to instruct the prosecution as requested in his motion *in limine*. By this preliminary motion, the defendant sought to prohibit the introduction of evidence of the defendant's fingerprint. The defendant's fingerprints were found on the butcher knife used to stab the deceased. The butcher knife was found in the home of the deceased after her death. We think that this evidence was competent, and, therefore, the denial of defendant's motion was proper.

3. Defendant contends that the trial court committed error in admitting the fingerprint evidence (1) because the defendant was shown to have been at the scene of the crime earlier that day and (2) there was at least one fingerprint on the knife which was unidentifiable. The cases cited by defendant in support of this contention are distinguishable. We hold that the fingerprint evidence was competent. It tended to corroborate the testimony of the State's witness that the defendant had used the knife in stabbing the deceased in the back.

4. The defendant contends that the trial court committed error by failing to instruct the jury that "each must decide the case upon his own opinion of the evidence, that the defendant was entitled to every inference in his favor and that where two inferences one consistent with innocence and one inconsistent, the defendant is entitled to the inference which is consistent with innocence; and as to the importance of the presumption of innocence under our law." The defendant made no written request for instructions on any particular phase of the case. The court properly charged that the defendant was presumed to be innocent and that "(t)he burden of proof is upon the State to satisfy you on the evidence and beyond a reasonable doubt of the defendant's guilt." Thus, the court properly required that in order to convict, the State must prove the defendant guilty from the evidence and beyond a reasonable doubt. We hold

that no error is made to appear in the charge of the court to the jury.

5. The defendant contends that the trial court committed error in failing to allow his motion for nonsuit. There was ample evidence of the defendant's guilt to require the submission of the case to the jury. The exceptions to the denial of the motion for judgment as of nonsuit cannot be sustained.

In the trial we find no error.

No Error.

MORRIS and GRAHAM, JJ., concur.

SUPREME COURT OF NORTH CAROLINA

ADRIAN J. NEWTON, *Clerk*

AREA CODE 919 829-3723—P. O. BOX 2170

RALEIGH, NORTH CAROLINA 27602

July 31, 1970

MRS. FREEDA D. WATKINS

MRS. FRANCES P. RANDOLPH

MRS. DIXIE J. ABELL

DEPUTY CLERKS

Mr. Robert G. Bowers, Attorney

P. O. Drawer 1557

New Bern, N. C. 28560

Re: State v Britt

#110PC, Spring Term 1970

Dear Mr. Bowers:

Petition for writ of certiorari to the North Carolina Court of Appeals to review its decision is filed with the following order:

"DENIED by order of the Court in conference this the 31 day of July 1970. Huskins, J. for the Court."

No written opinion is filed.

Yours very truly,
/s/ Adrian J. Newton

ADRIAN J. NEWTON

Clerk of Supreme Court

AJN/da .

Cc:

Attorney General

(Mrs) Christine Y. Denson, Staff Atty.

Mr. E. Lamar Sledge

SUPREME COURT OF THE UNITED STATES

No. 6073, October Term, 1970

CHARLES W. BRITT, JR., PETITIONER

v.

NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals of the State of North Carolina.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 22, 1971



SUPRE

U. S.

Supreme Court, U.S.

FILED

JUN 8 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~6072~~ **70-5041**

CHARLES W. BRITT, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NORTH CAROLINA

BRIEF OF PETITIONER, CHARLES W. BRITT, JR.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 6073

CHARLES W. BRITT, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NORTH CAROLINA

BRIEF OF PETITIONER, CHARLES W. BRITT, JR.

OPINION BELOW

Petitioner was first tried during the November 10, 1969, Session of the Superior Court Division of the North Carolina General Court of Justice in Craven County which trial ended on November 14, 1969 in a hopeless deadlock. The indigent defendant moved for a transcript of the evidence of this first trial at the expense of the state; however, this motion was summarily denied.

Petitioner was, again, tried during the December 18, 1969, Session of the Superior Court Division of the North Carolina General Court of Justice in Craven County on the original indictment charging him with the first degree murder of one JANIE BANKS on March 24, 1969. At this trial he

was found guilty of second degree murder and sentenced to the maximum sentence of thirty (30) years in prison from which an appeal was filed in the North Carolina Court of Appeals. In the decision of the North Carolina Court of Appeals, *State v. Britt*, 8 N.C. App. 262, 174 S.E.2d 69 (filed May 27, 1970), the court found no error and affirmed the conviction. Petitioner filed a petition for certiorari to the North Carolina Supreme Court which was denied.

Petitioner has filed this petition for writ of certiorari in the Supreme Court of the United States which has now been allowed.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS IMPOSED

The Petitioner contends that the failure and refusal of the trial court and in turn the Court of Appeals to provide him with a transcript of the evidence of the first trial denied him his basic rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The Petitioner further contends that the failure of the trial court to grant his motion *in limine* together with the admission of evidence with respect to fingerprints and the admission of evidence with respect to in-custody statements by the defendant (which action by the trial court was subsequently approved by the Court of Appeals) denied him his basic rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the Trial Court err in refusing to order this indigent defendant to be furnished with a transcript of the evidence at the first trial which resulted in a mistrial for use in connection with the second trial which ended in his conviction of second degree murder?

2. Did the Trial Court err in refusing to grant the defendant's motion *in limine*?

3. Did the Trial Court err in admitting fingerprint evidence when it was shown that the defendant had been at the scene earlier on the same day as the alleged crime and that there was at least one fingerprint which was unidentifiable?

STATEMENT OF FACTS

On March 25, 1969 JANIE BANKS was found dead, lying on the floor of her living room with wounds about her head, a shallow stab wound on her back and a cut on her right wrist. (A. 46)

Subsequently, the defendant was questioned on March 29, 1969 at the home of ETHEL BEST and then at the police station, but he was not given his *Miranda* warning until after the questioning at the apartment. (A. 25, 26)

On April 2, 1969, the defendant was arrested without a warrant (A. 26, 32, 37) and placed in jail and held without further procedure until April 7, 1969, when the Coroner's Inquest was held and the defendant was bound over to the Grand Jury.

Though Mr. Dowdy and Mr. Bratcher of the New Bern Police Department investigated the alleged crime, they kept no records and made no reports of any conversation with the defendant. (A. 29, 37)

The defendant was first put on trial on November 11, 1969 which ended in a mistrial on November 14, 1969. (A. 11) The indigent defendant moved for a transcript of the evidence and testimony at the expense of the state which motion was summarily denied. (A. 11-13)

Prior to the second trial, the defendant filed his motion *in limine* which was, also, summarily, denied. (A. 13 and 14)

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED
CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

§ 7A-450. *Indigency; definition, entitlement; determination.* (a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.

(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

§ 7A-454. *Supporting services.*—The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and

expenses accrued under this section shall be paid by the State.

ARGUMENT

STATEMENT, ARGUMENT AND AUTHORITY UNDER QUESTION ONE

Statement

On November 11, 1969, Petitioner was arraigned and placed on trial for his life. On November 14, 1969, after the case had been submitted to the jury, the jury reported a hopeless deadlock and a mistrial was ordered. (A. 11) The Petitioner moved for a free transcript of the evidence as an indigent for use in connection with the second trial which motion was denied by the trial judge. (A. 11, 12)

ARGUMENT AND AUTHORITY

I. THE PETITIONER WAS DENIED *DUE PROCESS OF LAW* IN THE REFUSAL OF THE COURT TO ALLOW PETITIONER A TRANSCRIPT OF THE FIRST TRIAL WHICH RESULTED IN A MISTRIAL.

As far back as 1956 this court said in *Griffin v. Illinois*, 351 U.S. 12, 19, that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Following the *Griffin* decision this court has consistently required that free transcripts be furnished to indigents on appeals, and that the state furnish an indigent defendant with every substantial litigation asset which a person with money could buy at least where it is practicable for the state to do so at no cost other than a financial one. See *Draper v. Washington*, 372 U.S. 487, and *Long v. District Court of Iowa*, 385 U.S. 192.

In any criminal case involving an indigent, the prosecution and the indigent defendant are grossly mismatched with the indigent being the disadvantaged. The inability of

a poor or indigent defendant to obtain full assistance in the development of defense without a transcript of the evidence at prior proceedings is inconsistent with the American fundamental principal of "equality before the law." To reduce the influence of poverty and to insure balance, the state should provide the poor or indigent defendant with such minimal services as a copy of the transcript of evidence taken at all prior proceedings in order to assist in the development, preparation and presentation of his defense.

At present, the poor or indigent defendant in North Carolina often lacks the tools to defend against the prosecution's contentions. Additional assistance (other than the mere presence of a person or "body" possessing a law license) is necessary for equal protection, representation and opportunity to defend; such assistance should be constitutionally mandated.

Defendant's poverty may make his attempts at defense so ineffective that to deny him necessary additional assistance such as a transcript of a previous trial or hearing is to deny him the basic foundation of a fair and equitable proceeding and would reduce the trial to a "meaningless ritual." In addition, an opportunity to prepare a defense is no less essential to the poor or indigent defendant than is the opportunity to prepare an appeal which has been deemed an essential element of fundamental fairness in *Douglas v. California*, 372 U.S. 353. See 32 Missouri Law Review 543, 549 (1967).

In *Griffin v. Illinois, supra*, this court considered the impact of poverty on constitutional rights under the equal protection clause. This court held that a state may not deprive indigent defendants of adequate review of alleged trial error solely because of their inability to pay the costs of necessary transcripts. There is apparently no "rational relationship" between the ability to pay for a transcript and the guilt or innocence of defendants, and any discrimination based on poverty violates the equal protection clause. See 43 Cornell Law Quarterly 1 (1957). Also, see *Smith v.*

Bennett, 365 U.S. 708, 714 (1961), where this court indicated that the policy of the equal protection clause is such that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." The *Griffin v. Illinois, supra*, and the *Douglas v. California, supra*, and the *Smith v. Bennett, supra*, doctrines, considered with respect to preparation of adequate defense, seem to require at least that a state provide assistance at the trial level if that assistance is necessary to the adequate preparation prior to trial and cross-examination during the course of the trial.

In a more recent decision in the Second Circuit in *United States ex rel. Wilson v. McMann*, 408 Fed.2d 896, it was held that the denial of defendant's application, prior to commencement of the second trial, for the evidentiary portion of the transcript, deprived defendant of his Constitutional right to equal protection of the law.

In that case the defendant was convicted in a New York State Court of a narcotics violation arising out of a sale to an undercover agent. Three other prosecution witnesses corroborated the undercover agent's testimony in varying degrees, but the first trial ended in a hung jury. Prior to the commencement of the second trial, assigned counsel applied for a transcript of the first trial. This application was denied, summarily, even though counsel argued that a denial would deprive the defendant, who was indigent, of equal protection of the laws and due process.

During the trial, when defense counsel attempted to impeach the undercover agent by asking him whether his testimony on a particular issue had changed since the first trial, the trial court ordered a partial transcript. Counsel for both sides met with the court reporter and went over the transcript, but it developed that the defense counsel's memory was faulty and that the undercover agent's testimony on the issue at the first trial was entirely consistent. Defendant was found guilty; and, after exhausting his state remedies, he sought a writ of habeas corpus, contending

that the denial of the transcript of the prior trial deprived him of equal protection of the law.

The petition was denied, but, on appeal, the Second Circuit reversed and remanded for a new trial. The court first noted that the transcript of the first trial would have been valuable to defense counsel both for impeachment and for preparation, and that the defendant was prevented only by indigency from obtaining it.

The appellate court rejected the state's contention that the error was harmless because defense counsel was permitted to see the Grand Jury testimony. It also, emphatically rejected the notion that the fact that Wilson was represented throughout by the same attorney excused the denial of the transcript. The court stated that counsel's recall should not be expected to be perfect, and pointed to the fact that counsel's mistaken memory caused an abortive attempt to impeach the undercover agent, unsuccessfully, and which in turn, unfortunately, brought out the inconsistencies. Had the trial court granted the motion for the transcript at the beginning, the Court of Appeals wrote, defense counsel would have read the undercover agent's testimony at the first trial and the entire train of events so prejudicial to the defendant would not have occurred. Limited access, the appellate court held, is a breeder of confusion and delay, and despite the best intentions of the trial judge may cause grave prejudice to the defense, as in this case. A new trial was therefore ordered.

The Court of Appeals of New York in *People v. Zabrocky*, 311 N.Y.S.2d 892, has since held that the denial of a motion to provide indigent defendants with a free copy of the minutes of a suppression hearing is, under that state's law, prejudicial error requiring a new trial despite the prosecution's contention of harmless error. "... the use to which a requested transcript may have been is irrelevant."

II. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH RESULTED IN A MISTRIAL.

The Sixth Amendment to the Constitution of the United States promises the assistance of counsel for one's defense. A person who is accused of a serious crime has the right to be assisted by appointed counsel if he cannot afford to employ an attorney of his own. As far back as *Powell v. Alabama*, 287 U.S. 45 (1932), this court asserted that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." The word "effective" sets no concrete standard but rather connotes the state of being capable of bringing about and effect. The defendant's attorney is incapable of giving effective aid unless at least a transcript of former trials and hearings is at his disposal.

The requirement of the Sixth Amendment to the Constitution of the United States has been made applicable to the states under the Fourteenth Amendment in *Powell v. Alabama*, *supra*, *Escobedo v. Illinois*, 378 U.S. 478; *Gideon v. Wainwright*, 372 U.S. 335, among other cases. However, as above stated, a defendant's right to the assistance of counsel is not satisfied by the mere formality of appointing an attorney by the court; the indigent defendant is entitled to effective representation throughout the course of the proceedings. See *Avery v. Alabama*, 308 U.S. 444; *Wade v. Mayo*, 334 U.S. 672; *Hawk v. Olson*, 326 U.S. 271; and *Hudson v. North Carolina*, 363 U.S. 697. The duty of the court in the protection of an indigent defendant is not discharged when counsel is precluded by the action of the court from giving his client effective assistance. *White v. Reagan*, 324 U.S. 760; *Powell v. Alabama*, 287 U.S. 45; and *Lyles v. Beto*, 329 Fed.2d 332 (C.A. 5).

The Sixth Amendment does not demand a favorable conclusion for the indigent, but effective assistance does require that each defense in the defendant's favor should be sought out, efficiently prepared, and adequately presented. If the "assistance" of the Sixth Amendment guarantee is emphasized in conjunction with the necessity of "effective" representation, the transcript of the first trial must be supplied.

In the instant case counsel for the indigent defendant was precluded from the benefit of the transcript of the first trial in preparation for the second trial as well as in the cross-examination of the witnesses for the prosecution. Because of the nonavailability of the transcript of the first trial counsel for the defendant in the instant case was prevented from testing his recollection with respect to the testimony particularly in connection with the witness Bratcher. Counsel for the defendant recalls that the witness Bratcher at the first trial testified that he, alone, used the fingerprint equipment and that he found an unidentifiable fingerprint on a water glass which was handled, admittedly, by the defendant. (A. 42) However, counsel for the defendant was afraid that if he pursued the cross-examination of the witness Bratcher, it would turn out that counsel's recollection was in error, and instead of pointing out the inconsistencies in the witness's testimony, the witness's testimony on this point would be blown out of proportion.

There is no question but that the defendant could have bought from the court reporter a transcript of the first trial if he had had the money. However, he did not have the money so that the quality of justice turned purely and simply on the defendant's indigency. Therefore, the defendant was deprived of the effective assistance of counsel.

III. THE DEFENDANT WAS DENIED *EQUAL PROTECTION UNDER THE LAW* IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT THE TRANSCRIPT OF THE FIRST TRIAL WHICH TERMINATED IN A MISTRIAL.

The full purport of the holding in *Griffin v. Illinois, supra*, is yet to be completely developed. However, it is possible to state its principal comprehensively as a command that the state which prosecutes an indigent must furnish him every substantial litigation asset which a nonindigent defendant can buy, at least where it is practicable for the state to do so at no cost other than a financial one. Certainly the most immediate implication of the *Griffin* decision itself and the *U.S. ex rel. Wilson v. McMann* decision require that the state record and transcribe at public expense all of the court proceedings in an indigent case, and that the indigent be given transcripts of all the preliminary proceedings in his case and perhaps related cases in adequate time to make use of them for trial preparation.

Following the *Griffin* decision, this court has required the provision of free transcript to indigents on both direct and collateral criminal appeals, e.g., *Draper v. Washington*, 372 U.S. 487 (1963); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); the waiver of filing fees for both appeals and collateral attack proceedings, *Byrd v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); and the provisions of appointed counsel on at least a criminal defendant's first appeal as of right from his conviction, *Douglas v. California*, 372 U.S. 353 (1963); *Swenson v. Bosler*, 386 U.S. 258 (1967).

STATEMENT, ARGUMENT AND AUTHORITY UNDER QUESTIONS TWO AND THREE

Statement

There was evidence introduced in the instant case that the defendant and Ethel Best were at the decedent's home between 3:00 and 3:15 o'clock in the afternoon on the day and date of the alleged crime. (A. 27, 31, 32, and 43) There was similar testimony at the first trial. Also, there was testimony that either Mr. Dowdy or Mr. Bratcher lifted a fingerprint from the crime scene which was transmitted to the State Bureau of Investigation's fingerprint expert together with fingerprint cards of persons possibly connected with the case, and there was one print which the expert was able to identify and unable to match. (A. 40) There was similar testimony at the first trial. As the result of the state of the evidence at the first trial, the defendant filed a motion *in limine* to preclude the use of such testimony until such time as the prosecution could show its materiality. (A. 13) This motion was, summarily, denied. (A. 14) The evidence of fingerprints was admitted over the defendant's objection. (A. 23, 24, 25, 38-45)

Argument and Authority

Conviction by use of inadmissible testimony is a denial of due process and the equal protection of the laws.

In 1937 in 109 A.L.R. 1089 the editors of that renown publication pointed out that there was an increasing problem with complaints against opposing counsel who asked prejudicial questions without any plausible *legal* foundation. Since then the need for motions *in limine* has steadily increased.

Besides the clear-cut situations referred to in 109 A.L.R. 1089, many times there is a difference of opinion between "logical relevancy" and "legal relevancy" which cannot be resolved without a court ruling.

If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effects, and the party is powerless unless he wants to forego his chance of a trial and ask for a mistrial. Once the questions are asked, the harm is done. Under the Harmless Error Rule, many of these matters would probably not be reversible error as in this case even though they have a subtle and devastating effect on the case. Perhaps the greatest single advantage of a motion *in limine* is the avoidance of objecting in the jury's presence to evidence which is "logically relevant." Jurors cannot be expected to understand why they should not be allowed to consider all evidence which is related to the case, and will usually resent the fact that an objection kept them from hearing it.

Another advantage of these motions is that they allow the trial judge an opportunity to study the question and the authority involved. However, in the instant case the judge listened to no argument, but, rather, summarily denied the motion.

While it is arguable that there is no logical basis for a trial judge to anticipate offers of evidence as attorneys are charged with the ethical responsibility of not undertaking the introduction of evidence or testimony which they know or have reasonable grounds to believe is inadmissible, and also because of the mass of holdings that evidentiary rulings can be cured by "instructions" to the jury, nonetheless, as a practicable matter, it must be conceded that under our adversary system the trial lawyers and the trial judge often fail to make the fine distinctions between "logical relevancy" and "legal relevancy." It is quite probable that the tangible value of not having to object to evidence that would appear to a jury to be material and relevant is a great advantage to all concerned.

The trial judge should have known and must have known the state of the evidence with respect to the fingerprints because he presided at the first trial which ended in a mistrial. (A. 11 and 14) The denial of the motion *in limine*

denied this defendant a fair and impartial trial, due process, and equal protection.

The fingerprint evidence concerning which this case was made, would appear to be immaterial in North Carolina under *State v. Minton*, 278 N.C. 518, 46 S.E.2d 296 (1948) which is cited in the motion. (A. 13)

It is conceded that evidence regarding fingerprints by a qualified witness is admissible to establish identity in North Carolina. See *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935). Also, proof that fingerprints found in the place where a crime was committed, under such circumstances that they could *only* have been impressed at the time the crime was committed, corresponded to those of the accused, may be sufficient proof of identity to sustain a conviction. See *State v. Tew*, 234 N.C. 612, 68 S.E.2d 291 (1951).

In the *Tew* case it was held that testimony of a fingerprint expert tending to show that fingerprints found on a piece of glass which had fallen from the front door from which it was broken to the inside of a filling station alleged to have been entered by the defendant, personal property being stolen therefrom, correspond with those of the defendant taken after his arrest, coupled with the testimony of the complainant that though she personally attended her service station, she did not and had not seen the defendant before the date of the crime, was sufficient to take the case to the jury and support a finding by it that the defendant was present when the crime was committed and that he at least participated in its commission. In this case there was evidence to the effect that the defendant had never been to the service station, and that his prints could not have been on the glass unless he was there *at the time of the crime*.

Where it appears that there were at the scene of the crime fingerprints other than those identified as the defendant's, and which are neither identified nor explained, the proof of the defendant's prints is not sufficient to support a conviction and is, therefore, immaterial.

Thus, in *State v. Minton*, *supra*, the court declaring that the fact the fingerprints corresponding to those of the accused are found in a place where a crime is committed is without probative force unless the circumstances are such that the fingerprints could only have been impressed at the time the crime was perpetrated, held that testimony that the print of the left thumb of one accused of breaking and entering with intent to commit larceny, and of larceny, appeared upon the outside of a piece of glass which originally occupied a position near the knob of the front door of the place entered, which was a public place, had no legitimate tendency to show that he was present when the shop was broken and entered and coins were taken therefrom. It appeared in that case as in the case against this defendant, *Britt*, (1) that there were fingerprints at the scene other than those identified as the defendant's, (2) that the expert witness testified that there was no way of knowing when the defendant's print was impressed upon the object or whose the other prints were, and (3) that the defendant had in fact entered the crime scene earlier.

Ervin, J. (now Senator), speaking for the court said that such evidence found at a scene of a crime has no probative force unless the circumstances are such that the prints could have been impressed only at the time that the crime was perpetrated. See 2 Strong, N.C. Index 2d, Criminal Law, Section 60.

If the evidence is without "probative force" it is not "legally relevant."

The case of *State v. Smith*, 274 N.C. 139, 161 S.E.2d 449 (1968) is an interesting case on this point. It involved a North Carolina Highway Commission secretary who on April 8, 1966, left her wallet containing a twenty dollar bill and a ten dollar bill on her desk. Later that day she took her wallet to a store and made a purchase, using the ten dollar bill. Shortly afterwards, she realized the twenty dollar bill was missing and went back to the store where she had made her purchases, thinking perhaps she had accidentally removed it from her wallet and it had dropped to the floor.

She saw the defendant each day thereafter in her room or office. On April 15, 1966 forty-one dollars in loose currency was missing from a drawer in the same secretary's desk. The defendant was a janitor. SBI agent Stephen R. Jones (the same fingerprint expert as in the instant case [A. 38]) took fingerprints of the defendant on 3 May 1966 and on July 11, 1967, Jones found Smith's fingerprints on plastic in the secretary's wallet on April 15, 1966. Smith was charged, only, with taking the twenty dollar bill.

The Supreme Court of North Carolina reversed Smith's conviction, holding the motion as of nonsuit should have allowed. In the opinion written by Parker, C.J., the court indicated, among other things, that it was not shown when Smith's prints got on the contents of the wallet reciting the rule that to warrant a conviction the fingerprint corresponding to the defendant's must have been found at the scene of the crime under such circumstances that it could *only* have been impressed *at the time when the crime was committed* and cited 28 A.L.R.2d 1115, 1154; *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931); *State v. Huffman*, *supra*; *State v. Helms*, 218 N.C. 592, 12 S.E.2d 243; *State v. Parker*, 230 N.C. 205, 52 S.E.2d 908; *State v. Tew*, *supra*; 30 Am. Jur. 2d, *Evidence*, Section 1144; and 3 Whorton's *Criminal Evidence*, Section 982, page 480.

30 Am. Jur. 2d, *Evidence*, Section 1144, says in part:

"... To warrant a conviction, however, it has been held that the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed, under such circumstances that they could only have been impressed at the time the crime was committed. Where it appears that there were fingerprints other than those identified as the defendant's, which are neither identified nor explained, the proof of the defendant's prints is not sufficient to support a conviction."

If the evidence will not support a conviction it is "legally irrelevant" and immaterial. If it is "legally irrelevant" and

immaterial, the court should have granted the defendant's motion *in limine* and the objections to the introduction of the evidence with respect to the fingerprints. In the instant case, the trial judge had already heard the evidence with respect to the fingerprints which was neither identified nor explained and the evidence placing the defendant at the place of the crime more than an hour before a crime was committed. Therefore, had the court followed the decision of *State v. Minton, supra*, the evidence would have been precluded.

22A C.J.S., *Criminal Law*, Section 530(2) says:

"Issues of fact can be determined only by the introduction of evidence made acceptable by statute or legal practice, and the accused is entitled to be tried on evidence properly admissible to establish the crime with which he is charged."

In this particular case the petitioner was entitled to be tried without the introduction of the incompetent and legally irrelevant evidence.

Without the fingerprint testimony, the testimony of the accomplice and the testimony of the "confession" would become much less significant. The evidence from the other sources in effect will diminish in its intensity since the fingerprint testimony was the primary source of illumination.

23 C.J.S., *Criminal Law*, Section 907, page 572, is as follows:

"Where circumstantial evidence consists of a number of connected and interdependent facts and circumstances, it is like a chain which is no stronger than its weakest link; if any link is missing or broken, the continuity of the chain is destroyed and its strength wholly fails."

It may well be that the jury would not believe the testimony of the accomplice, ETHEL BEST, since she testified that the solicitor (prosecuting attorney), her lawyer, and she got together; and she was told to go to court and testify and get herself out of trouble (A. 51) together with the

statement by the solicitor that he had told her that he would not prosecute her and that after she testified the state took a *nol. pros.* (A. 51 and 17)

Also, without the identifying features of the fingerprint testimony, there could easily be a reasonable doubt with respect to the so-called confession before a police officer who had been trained for many years but who didn't bother to reduce to writing any of his efforts in connection with the investigation of this case, and in particular did not keep notes with respect to any conversations that may have transpired between the petitioner and him. (A. 29, 36, and 37) Is it reasonable to assume a competent, well-trained Chief of Detectives would investigate such a serious matter as a capital murder and not maintain any records of any kind, whatever?

In view of the fact that the first jury was unable to agree and the trial ended in a hopeless deadlock, and the second jury obviously compromised on a second degree murder, there must have been some great doubt in the minds of at least some of the jurors with respect to one or more of the elements of the alleged offense.

CONCLUSION

The defendant, this Petitioner, was denied equal protection under the laws, due process, and effective representation by the trial court's refusal to provide him and his counsel with the transcript of the evidence of the first trial in order to adequately prepare for the second trial and to use the transcript for impeachment purposes at the second trial so that the defendant could have effective representation. The court also denied the defendant due process and equal protection of the laws by admitting immaterial and legally irrelevant fingerprint testimony and failing to instruct the prosecution not to offer such testimony unless and until he could show that it was material and legally relevant outside the presence of the jury; that is show that it met the

tests laid down in *State v. Minton, supra*, as well as other cases cited above.

WHEREFORE, this Petitioner prays for a reversal of the conviction, and his immediate release or at least a new trial free from error and with a transcript of all preceding trials and hearings.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 6073

CHARLES W. BRITT, JR.,

Petitioner

v.

STATE OF NORTH CAROLINA

Respondent

BRIEF OF RESPONDENT
STATE OF NORTH CAROLINA

OPINION BELOW

Petitioner was tried during the December 18, 1969, Session of Craven County Superior Court in Craven County, North Carolina, on an indictment charging first degree murder of one Janie Banks on the 24th of March, 1969. He was found guilty of second-degree murder and sentenced to thirty years' imprisonment from which appeal was filed to the North Carolina Court of Appeals. In the decision of the Court of Appeals, *State v. Britt*, 8 N. C. App. 262, 174 S. E. 2d 69 (Filed May 27, 1970), the North Carolina Court of Appeals found no error and affirmed the conviction. Petitioner filed a petition for certiorari in the North Carolina Supreme Court which was denied.

Petitioner's petition for writ of certiorari in this Court to the North Carolina Court of Appeals was allowed (401 U.S. ____; 91 S. Ct. 1204, 28 L. Ed. 2d 322).

QUESTIONS PRESENTED

- I. WAS THE DEFENDANT DENIED DUE PROCESS OF LAW IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH ENDED IN MISTRIAL?
- II. WAS DEFENDANT DENIED DUE PROCESS OF LAW FOR THE REFUSAL OF THE COURT TO INSTRUCT THE PROSECUTOR NOT TO MENTION A KNIFE FOUND AT THE SCENE OF THE CRIME AND IN GRANTING A MOTION TO ADMIT CERTAIN FINGERPRINT EVIDENCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

§ 14-17. *Murder in the first and second degree defined; punishment.* - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF THE CASE

The defendant was tried upon a bill of indictment charging him with murder in the first degree of Janie Banks.

The evidence of the State tended to show that the defendant went to the home of Janie Banks on 24 March 1969 and stabbed

her in the back with a knife. Then "(h)e threw the knife down on the floor and put his arm around her mouth so she couldn't holler, and grabbed an iron poker beside the heater. He beat her in the back and across the shoulder and beat her down to the floor. Then he went out of the front room toward the kitchen and came back in with this frying pan here. Just as he got back in the front room, she had started to get up; she was trying to make it up off the floor. He started beating her with the frying pan. He beat her until he beat her brains out." Thereafter, the defendant ransacked the house before leaving. The defendant offered no evidence.

The defendant, an indigent, was represented at the November 1969 trial, at the December 1969 trial, and on this appeal by the same two attorneys who were appointed on 3 June 1969 to represent him.

The first trial ended in a mistrial on 14 November 1969 when the jury could not agree on a verdict.

The second trial ended on 18 December 1969 after the jury had found the defendant guilty of murder in the second degree and the court had sentenced him to the State Prison for a term of thirty years.

ARGUMENT

I

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH ENDED IN MISTRIAL.

This Court held in *Griffin v. Illinois*, 351 U. S. 12, at p. 19, 100 L. Ed. 2d 891, 76 S. Ct. 585 (1955), that "d/estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The various jurisdictional circumstances in which this Court has been presented with a transcript question are:

(1) *Griffin v. Illinois, supra*, wherein transcript of trial was requested for direct appeal. Illinois law allowed the county to furnish a transcript at public expense if the sentence was death. Alternatively, the Illinois Post-Conviction statute would provide a free transcript if constitutional questions were raised in petition for review.

(2) *Eskridge v. Washington*, 357 U. S. 214, 2 L. Ed. 2d 1269, 78 S. Ct. 1061 (1958), wherein transcript of trial was requested for direct appeal. Washington law allowed the State to furnish a transcript at public expense if in the judgment of the trial judge justice would be promoted.

(3) *Draper v. Washington*, 372 U. S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963), wherein transcript of trial was requested for direct appeal. The Rules of the Supreme Court of Washington, promulgated since *Eskridge*, again provided for review of the question of necessity by the trial judge. After a hearing on the question of necessity of the transcript, the trial judge found the assignments of error "patently frivolous" and denied the motion for the transcript.

(4) *Long v. District Court of Iowa*, 385 U. S. 192, 17 L. Ed. 2d 290, 87 S. Ct. 362 (1966), wherein transcript of an Iowa trial court hearing on a petition for habeas corpus was requested. The Iowa judge held that habeas corpus was civil in nature and no provision was made for furnishing a transcript.

(5) *Roberts v. La Vallee*, 389 U. S. 40, 19 L. Ed. 2d 41, 88 S. Ct. 194 (1967), wherein transcript of a preliminary hearing was requested in preparation for trial. New York law provided that a transcript of the preliminary hearing could be secured if paid for.

(6) *Gardner v. California*, 393 U. S. 367, 21 L. Ed. 2d 601, 89 S. Ct. 580 (1969), wherein transcript of a California trial court hearing on a petition for habeas corpus was requested. California appellate procedure provides for a hearing *de novo* on appeal.

(7) *Wade v. Wilson*, 396 U. S. 282, 24 L. Ed. 2d 470, 90 S. Ct. 501 (1970), wherein transcript of

trial was requested for preparation of a petition for habeas corpus.

In all of these cases, the Court has held that the criminal defendant was entitled to a copy of a transcript where it appeared that a cellmate, having the price of a transcript, could secure one. The only case not involving a direct or collateral attack on the trial itself or of some review of the trial (*Long and Gardner*), was *Roberts* and there a State statute provided for furnishing transcripts upon payment of the fee. Also, very much to the point of this Court's decision in *Roberts*, the New York Court of Appeal had only recently declared that very statute unconstitutional as applied to the indigent defendant.

Three Circuit Courts of Appeals have confronted and decided the question presented by this appeal regarding the transcript of a first trial resulting in mistrial.

In 1963 in an opinion by then Circuit Judge Burger, *Nickens v. United States*, 323 F. 2d 808 (D. C. Circuit, 1963), the court was confronted with a conviction in federal court challenged partly on the ground of failure to supply a transcript of a first trial which resulted in mistrial. The court said:

There is no absolute right to have the transcript of a prior trial against the contingency, now urged, that some witness at the second trial may give inconsistent testimony. Any inconsistency in testimony arising at the second trial could readily be dealt with by calling the reporter of the prior trial to read the earlier testimony. Appellant had the same counsel at both trials. The District Court did not abuse its discretion in denying appellant's bare demand for a transcript in these circumstances. (323 F. 2d, at 811.)

In *Forsberg v. United States*, 351 F. 2d 242 (9th Cir., 1965), the decision of the court was much the same:

Appellant was represented by the same counsel at both trials. The court ruled that it would permit the reporter, during the second trial, to read to appellant's lawyer, out of the presence of the jury, the testimony

of any witness who had testified at the first trial. The district court did not abuse its discretion in denying appellant's request for a transcript under these circumstances. (351 F. 2d, at 248)

United States v. McMann, 408 F. 2d 896 (2d Cir., 1969), is the only case in the Circuit Courts of Appeals found to the contrary. *McMann* contained three strong elements not in the instant case which militated for a decision in favor of a right to a transcript: (1) the key to the prosecution's case was an undercover detective, the cross-examination of whom was very important; (2) the prosecutor in his summation alluded to the fact that inconsistent testimony had been suggested but not proven; and (3) the judge in charging the jury stated that the previous trial was only important if it showed inconsistent statements and he didn't remember such a showing.

In the present case, possible inconsistent testimony in the two trials deals only obliquely with the central issues of the case. For example, Detective Bratcher indicates that he does not recall his first trial testimony to be that he had the defendant and his girlfriend at the police station about an hour and a half (A. pp. 27, 28-29), although he does not deny that was true; he doesn't recall if he earlier testified as to defendant's clothes (A. p. 28). Bratcher indicated that he recalled his testimony from the first trial regarding where fingerprints were taken and what was dusted for prints (A. p. 35), except that if he said at the previous trial that he dusted the water glass, that was error (A. p. 38). None of these questions are essential to the State's proof of its case or to the defense. The police officer and Ethel Best are positive in their statements as to the elements of the offense and defendant's actions and impeachment as to the minor issues would have accomplished nothing.

For this Court to establish the "right" of the accused to a transcript of mistrials, absent a showing of need required by the federal statute (28 U. S. C. §§ 753(f), 1915), when defendant is represented by the same counsel at both trials would, we contend, unnecessarily burden the court system. The Sixth Circuit Court of Appeals in *Bentley v. United States*, 431 F. 2d 250 (1970), observed that such a decision would require substantial

appropriations and further burden already over-burdened reportorial and stenographic services of that Circuit. Although the number of such cases in North Carolina is unknown, one can well imagine that the bill for transcripts already paid by the State (approximately \$75,000 annually) would increase.

Further, in this time when the disruptive defendant often causes a mistrial by his own misconduct, he might be given further impetus, being assured of a transcript with which to discredit a key witness or cloud the issues, to bring about a second, third or additional trials.

Rather, a mistrial should remain in law a nullity. Having no effect on the status of the defendant, unappealable, it should be treated as if it never happened, giving both the State and a defendant a fresh start with a new trial.

II

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW FOR THE REFUSAL OF THE COURT TO INSTRUCT THE PROSECUTOR NOT TO MENTION A KNIFE FOUND AT THE SCENE OF THE CRIME AND IN GRANTING A MOTION TO ADMIT CERTAIN FINGERPRINT EVIDENCE.

The basic difference between the approach of the State and the defendant to this evidence regarding fingerprints is that the State will not concede the alleged irrelevancy of these fingerprints. Rather, they are considered to be highly material to the case. Defendant's motion in limine (A. p. 13) requests that the Court instruct the State and its counsel not to mention the fingerprints found on a butcher knife in the home of the deceased and considered to be the weapon which inflicted a stab wound in her back but which was not the wound resulting in death. Also, the evidence as to fingerprint identification from the police officers and the expert witness from the SBI dealt with the fingerprint of the defendant found on the butcher knife (A. pp. 23-25, pp. 39-41). Defendant at first denied to Detective Bratcher that he had seen the knife (A. p. 31) but later when he was told that his fingerprints were found on it, he told the detective that the knife was sitting at the end of the sofa by the heater when he was at the deceased's home.

earlier that day and that he picked it up to throw it in the heater but then put it back down (A. pp. 31 & 32). The knife was found in a bent condition after the killing and was assumed to be the weapon which inflicted the stab wound in the back of the deceased. Although the medical witness indicated that he could not tell whether that wound was inflicted after the head injuries which caused death, he did say that the wound was inflicted at about the same time (A. pp. 46 & 47). Therefore, the knife becomes a weapon used by the killer, something more important than a mere fixture or a piece of glass around the point of entry of a building but the actual instrument by which the crime was partially accomplished. Its legal relevancy at that point is clearly established and the fact that defendant might have another explanation of why his fingerprints appeared on one of the defendant's weapons is something for the jury to consider and evaluate.

The case of *State v. Minton*, 228 N. C. 518, 46 S. E. 2d 296 (1948), relied on by the defendant, can easily be distinguished from the instant case. In *Minton* the defendant's fingerprint was found on a piece of glass which was evidently broken in order to secure entrance to a store. However, the piece of glass was in the door to the store and there was evidence that the defendant and several other persons had been customers of the store that day so there was a perfectly logical explanation for the print being there. The only evidence in the case was purely circumstantial. The Court emphasized, 228 N. C. at p. 521, that the thumb print of the defendant was found in a "public place" and that there were many other fingerprints on that same segment of glass which could not be identified and that the State had no way of knowing when the defendant's thumb print was put on the glass. In the instant case, we have not a "public place" but the home of the deceased. The print is not on a mere fixture or the outside of the house but on one of the weapons used by the assailant. In addition, the case has the confession of the defendant on testimony of the police officer and also the testimony of the defendant's girl friend who was present at the time of the killing. Therefore, unlike *Minton*, the evidence is not purely circumstantial against the defendant and the question of the presence of his fingerprints was a question properly for consideration of the jury.

CONCLUSION

The defendant was accorded a fair trial. Absent some showing of need, he is not entitled as a matter of right to secure the transcript of the first trial resulting in a mistrial. The fingerprint evidence, relevant to his touching the knife which was a weapon used by the assailant and his involvement in the crime itself were relevant and properly considered by the jury.

Respectfully submitted,

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BRITT v. NORTH CAROLINA

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 70-5041. Argued October 14, 1971—Decided December 13, 1971

Petitioner was convicted of murder a month after his previous trial had ended with a hung jury. Both trials took place in a small town before the same judge and with the same counsel and court reporter, who (as was conceded) was well known to defense counsel and other local lawyers and would have read back his notes to defense counsel before the second trial had he been asked to do so. Between the two trials petitioner, alleging indigency, filed a motion for a free transcript, which the trial court denied. The appellate court affirmed the conviction, holding that an adequate alternative to the transcript was available. *Held*: In the narrow circumstances of this case, a transcript was not needed for petitioner's defense. Pp. 227-230.

8 N. C. App. 262, 174 S. E. 2d 69, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and WHITE, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 230. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 230.

Robert G. Bowers argued the cause and filed a brief for petitioner.

Christine Y. Denson, Assistant Attorney General of North Carolina, argued the cause for respondent. With her on the brief was *Robert Morgan*, Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner's three-day murder trial ended in a mistrial when the jury reported a hopeless deadlock. A retrial was scheduled for the following month. In the interim, petitioner filed a motion alleging that he was indigent, and asking for a free transcript of the first trial. The trial court denied his motion, and the North

Carolina Court of Appeals affirmed, stating that the record of the case did not reveal a sufficient need for the transcript. 8 N. C. App. 262, 174 S. E. 2d 69 (1970). The North Carolina Supreme Court denied certiorari. We granted certiorari to determine whether the rule of *Griffin v. Illinois*, 351 U. S. 12 (1956), applies in this context. 401 U. S. 973 (1971). We conclude that it does, but that in the narrow circumstances of this case, no violation of that rule has been shown, and therefore we affirm.

Griffin v. Illinois and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.¹ The question here is whether the state court properly determined that the transcript requested in this case was not needed for an effective defense.

In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.² MR. JUSTICE

¹ *Williams v. Oklahoma City*, 395 U. S. 458 (1969); *Gardner v. California*, 393 U. S. 367 (1969); *Roberts v. LaVallee*, 389 U. S. 40 (1967); *Long v. District Court of Iowa*, 385 U. S. 192 (1966); *Draper v. Washington*, 372 U. S. 487 (1963); *Eskridge v. Washington Prison Board*, 357 U. S. 214 (1958); *Griffin v. Illinois*, 351 U. S. 12 (1956).

² See *Draper v. Washington*, *supra*, at 495-496, and other cases cited n. 1, *supra*.

DOUGLAS suggests that the North Carolina courts refused to order a transcript in this case both because petitioner failed to make a particularized showing of need, and because there were adequate alternative devices available to him.

We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case.³ As MR. JUSTICE DOUGLAS makes clear, even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.

But the court below did not use the language of "particularized need." It rested the decision instead on the second factor in the determination of need, that is, the availability of adequate alternatives to a transcript. The second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart. In these circumstances, the court suggested that petitioner's memory and that of his counsel should have furnished an adequate substitute for a transcript. In addition, the court pointed to the

³ In *Griffin*, the Court was able to rely on a concession of need by the State, 351 U. S., at 13-14, 16. In subsequent cases the Court has taken judicial notice of the importance of a transcript in a variety of circumstances, see *Eskridge*, *supra*, at 215; *Gardner*, *supra*, at 369-370. Most recently in *Long* and *Roberts* the Court simply found it unnecessary to discuss the question, notwithstanding the fact that in *Roberts* Mr. Justice Harlan argued in dissent that petitioner had suggested no use to which the transcript could have been put, 389 U. S., at 43.

fact that petitioner could have called the court reporter to read to the jury the testimony given at the mistrial, in the event that inconsistent testimony was offered at the second trial.

We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial.⁴ Moreover, we doubt that it would suffice to provide the defendant with limited access to the court reporter during the course of the second trial. That approach was aptly rejected as "too little and too late" in *United States ex rel. Wilson v. McMann*, 408 F. 2d 896, 897 (CA2 1969). At oral argument in this case, however, it emerged that petitioner could have obtained from the court reporter far more assistance than that available to the ordinary defendant, or to the defendant in *Wilson*. The trials of this case took place in a small town where, according to petitioner's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial. It appears that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request.⁵

⁴ While trial notes might well provide an adequate substitute for a transcript, the failure to make such notes does not bar an indigent prisoner from claiming the right to a free transcript, *Eskridge, supra*, at 215. As for requiring a prisoner to rely on his memory, this Court rejected that as an alternative to a transcript in *Gardner, supra*, at 369-370, and *Williams, supra*, at 459. Indeed, in *Long* we refused to consider any alternatives suggested by the State, on the ground that in that case a transcript was in fact available and could easily have been furnished. 385 U. S., at 194-195. Whether a transcript is similarly available in this case does not appear from the record.

⁵ Tr. of Oral Arg. 12. Cf. *Avery v. Alabama*, 308 U. S. 444, 450-452 (1940) (Black, J.).

A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. In this case, however, petitioner has conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript.⁶ Accordingly, we cannot conclude that the court below was in error in rejecting his claim.

For these reasons the judgment is *Affirmed.*

MR. JUSTICE BLACKMUN concurs in the result, but he would dismiss the petition for certiorari as having been improvidently granted.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

After the State's first murder prosecution of the petitioner ended in a hung jury in November 1969, Britt was retried, convicted, and sentenced to 30 years' imprisonment. During the interim between the two trials, the petitioner made a showing of indigency and asked that the State provide him with a free transcript of the mistrial. The trial court denied his motion despite Britt's contention that because a more affluent defendant could purchase such a transcript as a matter of right a denial of his request would offend the principle of *Griffin v. Illinois*, 351 U. S. 12 (1956). On appeal, the North Carolina Court of Appeals was likewise unconvinced by Britt's equal protection claim and affirmed the trial court's refusal to order a free transcript, stating that

⁶ Cf. *Wade v. Wilson*, 396 U. S. 282 (1970), in which no such concession was made. In that case it simply appeared from the record that petitioner might have been able to borrow a transcript from the prosecutor, in light of the fact that he had done so in an earlier proceeding. We remanded the case to permit exploration of that possibility.

(a) the petitioner had not made a particularized showing of need, (b) he had been represented by the same lawyer at both trials, and therefore (c) any suspected inconsistencies in prosecution evidence could have been developed by counsel's putting on the court reporter to read earlier testimony of the first trial. Because I am persuaded by Britt's argument I would reverse the decision of the North Carolina Court of Appeals.

I

Griffin v. Illinois, *supra*, at 19, established the now familiar principle that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." While *Griffin* involved only the provision of a free transcript to an indigent on direct appeal, its underlying principle has achieved broader usage. We have witnessed a steady growth of its applications to other transcript cases,¹ to docketing fees,² and to right to counsel.³

¹ *Wade v. Wilson*, 396 U. S. 282 (1970); *Gardner v. California*, 393 U. S. 367 (1969); *Roberts v. LaVallee*, 389 U. S. 40 (1967); *Long v. District Court of Iowa*, 385 U. S. 192 (1966); *Draper v. Washington*, 372 U. S. 487 (1963); *Eskridge v. Washington Prison Board*, 357 U. S. 214 (1958); *Ross v. Schneckloth*, 357 U. S. 575 (1958); *People v. Montgomery*, 18 N. Y. 2d 993, 224 N. E. 2d 730 (1966). An indigent's right to a transcript of grand jury testimony in the federal courts is now protected by the Criminal Justice Act of 1964, at least to the extent that any defendant—whether rich or poor—has access thereto. 18 U. S. C. § 3006A (e)(1). In the Second and Seventh Circuits federal defendants have absolute rights to all grand jury minutes. *United States v. Youngblood*, 379 F. 2d 365 (CA2 1967); *United States v. Amabile*, 395 F. 2d 47, 53 (CA7 1968). And in all other circuits the grand jury testimony of an individual prosecution witness is discoverable under the recent amendments to the Jencks Act. 18 U. S. C. § 3500 (e)(3).

² *Boddie v. Connecticut*, 401 U. S. 371 (1971); *Smith v. Bennett*, 365 U. S. 708 (1961); *Burns v. Ohio*, 360 U. S. 252 (1959).

³ *Anders v. California*, 386 U. S. 738 (1967); *Swenson v. Bosler*, 386 U. S. 258 (1967); *Douglas v. California*, 372 U. S. 353 (1963); see also *Gideon v. Wainwright*, 372 U. S. 335 (1963).

Of these applications, *Roberts v. LaVallee*, 389 U. S. 40 (1967), is most analogous to the instant circumstances. In *Roberts*, an indigent defendant before trial asked a state court to provide him with a free transcript of a preliminary hearing at which a key state witness had testified. In *Roberts*, as here, no special showing of need was made, the defendant was represented by the same counsel at all times, and the court reporter could have been called to read back previous testimony. *Id.*, at 43. Nonetheless, over the dissent of Mr. Justice Harlan that no prejudice had been shown, *id.*, at 44, we held that withholding the requested transcript was an invalid interposition of a financial consideration between an indigent prisoner and his right to sue for his liberty. *Id.*, at 42.

Here the request was for a mistrial transcript, whereas in *Roberts* a motion had been made for a preliminary hearing transcript. In the ways in which either might be used I can perceive no differences. In both sets of circumstances it would seem that defendants would be interested in better trial preparation and in better positions from which to challenge discrepancies in government witnesses' stories.⁴ For both of these purposes a mistrial transcript would be more valuable than a preliminary hearing recording because the former is a virtual dry run of the entire prosecution's case, information which normally is clothed in top secrecy under the prevailing and restrictive rules against a criminal defendant's discovery.

⁴ These two reasons were offered by the Second Circuit to explain why a mistrial transcript might be useful. *United States ex rel. Wilson v. McMann*, 408 F. 2d 896 (CA2 1969). Our discussion in *Roberts* did not suggest any ways in which the transcript of the pretrial hearing might have been useful, although our *per curiam* intimated that perhaps counsel desired to have a check against the testimony of a key witness, *Roberts v. LaVallee*, *supra*, at 41; nor did the Second Circuit's discussion of the issue, *United States ex rel. Roberts v. LaVallee*, 373 F. 2d 49 (CA2 1967).

Perhaps for these considerations the Second Circuit has squarely held that indigent state defendants have an absolute right to free transcripts of previous prosecutions ending in hung juries. *United States ex rel. Wilson v. McMann*, 408 F. 2d 896 (CA2 1969). As both here and in *Roberts*, Wilson had made no showing of particular need, had been represented by the same lawyer at all times, and could have called the court reporter to read back previous testimony. And, as here, the defendant had requested a mistrial transcript during the interim between the two prosecutions. The Second Circuit considered *Griffin* and *Roberts* controlling.

The North Carolina Court of Appeals, however, has rejected the *Griffin-Roberts-Wilson* cases and sought refuge in the pre-*Roberts* authority of *Nickens v. United States*, 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), which had emphasized, as did the court below, the defendant's failure to articulate a particular need for a transcript, the continuity of defense counsel, and the availability of the court reporter.⁵ I thought that these arguments had been found irrelevant for constitutional purposes under *Griffin-Roberts-Wilson*.

II

The primary rationale offered to support the holding below is that the petitioner failed to make a showing of a particularized need for a mistrial transcript. Presum-

⁵ *Nickens v. United States*, 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), was decided before the full development of our transcript cases. The majority opinion in *Nickens* gave the other issues in the case more plenary consideration. Judge Wright concurred in the majority's view that no transcript had been required but only because he believed a motion to obtain a transcript had not been properly raised. *Id.*, at 345, 323 F. 2d, at 815. Also cited in the North Carolina opinion was *Forsberg v. United States*, 351 F. 2d 242 (CA9 1965), also a pre-*Roberts* opinion, which relied solely on *Nickens* in denying a mistrial transcript to an indigent. *Id.*, at 248.

ably this rationale flows from the legitimate state interest in avoiding needless fiscal outlays. In related contexts we have rejected the notion that an impoverished accused in the federal courts may be refused a transcript simply because his lawyer is unable to articulate the very subtleties which might be buried in the document he seeks. For example, in *Hardy v. United States*, 375 U. S. 277 (1964), we required Courts of Appeals to order for indigent criminal appellants complete trial transcripts even for the preliminary purpose of determining whether their appeals might present nonfrivolous questions for review and therefore entitle them to *in forma pauperis* relief pursuant to 28 U. S. C. § 1915. We rejected the then-prevailing view that a full transcript for such purposes could only be provided for those appellants able to demonstrate a particular need for all parts thereof. The concurring opinion of four Justices concerning the value of a transcript in appellate advocacy is applicable to the analogous use of a mistrial transcript in formulating retrial strategy:

"As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. . . .

" . . . No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal." *Hardy v. United States*, *supra*, at 288 (Goldberg, J., concurring).

Similarly, while counsel is studying mistrial minutes, the precise words used by a witness might trigger mental

processes resulting in legitimate defense strategies which otherwise might be overlooked. Such spontaneity can hardly be forecast and articulated in advance in terms of special or particularized need.

It is unnecessary, however, to speculate as to how often helpful subtleties in mistrial transcripts might actually be found because, as a more general matter, at least two compelling interests would be routinely served by providing paupers with free transcripts, even in cases where counsel were unable to specify the precise nature of the benefits of such discovery. As mentioned earlier, one such interest is that of effective trial preparation by counsel (who may realize that his counterpart, the prosecutor, will employ a similar document supplied at the State's expense during his own trial preparation). The other interest is that of anticipating possible discrepancies in prosecution witnesses' statements and in being prepared immediately to challenge such contradictions. See *Wilson, supra*, at 897. Because wealthier defendants tend to purchase transcripts as a matter of course simply on the strength of these recurring interests, it would appear that these benefits are ordinarily worth the fiscal burden of providing the documents regardless of how the cost of reproducing minutes may be distributed.⁶

When viewed in the broader context of a defendant's complete lack of criminal discovery procedures, the importance of a mistrial transcript becomes even clearer. Many commentators have criticized the persistent common-law prohibition against discovery by criminal de-

⁶Professor Robert Keeton notes that in civil cases involving large amounts of money it is standard practice for lawyers to place "a standing order with the reporter for 'daily copy' of the trial proceedings." R. Keeton, *Trial Tactics and Methods* 104 (1954). Presumably when wealthy clients are haled before criminal courts rather than before civil ones, their attorneys likewise place such standing orders.

fendants, characterizing present systems as "sporting theories of justice" and complaining of the vast advantage enjoyed by the prosecution in the marshalling of evidence.⁷ While some States and the federal system have moved to liberalize defendants' discovery priv-

⁷ The excessive disparity between the State and the accused in their respective investigative resources, and the common law's prohibition against discovery have been summarized as follows by one commentator:

"[T]he law enforcement agency is often at the scene of the crime shortly after its commission. While at the scene, the police have better access to witnesses with fresher recollections. They are authorized to confiscate removable evidence. In addition, the financial and investigatory resources of law enforcement agencies permit an extensive analysis of all relevant evidence.

"The defendant has the option of hiring a private investigator. However, the investigator will probably get to the scene long after the occurrence of the crime and after the police have made their investigation and removed all relevant physical evidence. The defendant's investigator may have difficulty viewing the scene if it is on private property. Witnesses may be less accessible; their recollections will probably be less precise. Indeed they may choose not to cooperate at all with the defendant's investigator. However, it may all be irrelevant if, as is often the case, the defendant is unable to afford an investigator or is incarcerated pending trial.

"The defendant is helpless to cope with the uncooperative witness while the prosecutor has numerous means to compel testimony. First, there is the possibility of coroner's inquest or a preliminary hearing. And if the prosecution prefers not to have the defense present, some jurisdictions allow the prosecution to take testimony while the defendant and his attorney are excluded. The uncooperative witness can be subpoenaed to appear before the grand jury and required to testify, again without the presence of the defense. The defense cannot, usually, discover the grand jury minutes.

"Many states require that the defendant give notice of intended alibi or insanity defenses. The prosecution's burden, in bringing a charge, in contrast, has been substantially lessened. Mere recitation of the statute may be a sufficient pleading of the charge. Amendments to the indictment or information are liberally allowed; duplicity and variances are no longer serious defects. Liberal

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ileges,⁸ the common-law prohibition with limited exceptions still applies in North Carolina.⁹ No criminal analogue has been enacted to complement the State's more modern and comprehensive rules of civil discovery.¹⁰ Instead its judiciary has continued to apply the common law's flat ban and as recently as 1964 has reaffirmed that policy. In *State v. Goldberg*, 261 N. C. 181, 134 S. E.

pleading rules deprive the defendant of effective notice of the circumstances of the offense." Norton, *Discovery in the Criminal Process*, 61 J. Crim. L. C. & P. S. 11, 13-14 (1970).

See generally Handzel, *Criminal Law: Pre-Trial Discovery—The Right of an Indigent's Counsel to Inspect Police Reports*, 14 St. Louis U. L. J. 310 (1969); Moore, *Criminal Discovery*, 19 Hastings L. J. 865 (1968); A State Statute to Liberalize Criminal Discovery, 4 Harv. J. Legis. 105 (1967). Comment, *Disclosure and Discovery in Criminal Cases: Where Are We Headed?*, 6 Duquesne U. L. Rev. 41 (1967); Golden & Palik, *Bibliography: Criminal Discovery*, 5 Tulsa L. J. 207 (1968); Symposium: *Discovery in Federal Criminal Cases*, 33 F. R. D. 47 (1963); Brennan, *Criminal Prosecution: Sporting Event or Quest For Truth?*, 1963 Wash. U. L. Q. 279.

⁸ See Fed. Rules Crim. Proc. 15-17. See also Note, *Discovery Procedures Under New York's New Criminal Procedure Law*, 38 Brooklyn L. Rev. 164 (1971); *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution*, 7 A. L. R. 3d 8 (1966).

⁹ Statutory exceptions to common-law ban in North Carolina may be found at N. C. Gen. Stat. § 8-74 (1969) (depositions of witnesses unable to attend trial); and at § 15-155.4 (Supp. 1969). The latter provision was enacted in 1967 and permits limited discovery of prosecution evidence where (a) good cause is shown for discovery, (b) the prosecution intends to use the evidence at trial. The latter condition would effectively prevent defendants' discovery of evidence which might be favorable. The only reported decisions considering this addition are those in *State v. Macon*, 276 N. C. 466, 173 S. E. 2d 286 (1970), affirming 6 N. C. App. 245, 170 S. E. 2d 144 (1969), upholding the refusal of a trial court to permit an accused's inspection of notes which had been made by a specified police officer during the accused's interrogation.

¹⁰ N. C. Gen. Stat. c. 1A (1969).

2d 334 (1964), the North Carolina Supreme Court affirmed a trial court's refusal to order the State Bureau of Investigation to permit a defendant to inspect certain documents in its files. In explaining the ancient rule the court approved the language of Chief Justice Vanderbilt's well-known view of criminal discovery in the leading case of *State v. Tune*, 13 N. J. 203, 98 A. 2d 881 (1953):

"In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice."

State v. Goldberg, supra, at 192, 134 S. E. 2d, at 341.¹¹

North Carolina's presentation of an anti-discovery policy is evidenced not only in its reluctance to enact a modern code to permit such procedures but also in its occasional one-sided legislation concerning related matters. For example, while a local prosecutor has an absolute right to inspect the files of the State Bureau of Investigation which pertain to one of his local inquiries, an accused may inspect such evidence only upon court order procured for good cause. See N. C. Gen. Stat. § 114-15 (1966). Even a common-law request for a bill of particulars to clarify an indictment normally does not require a prosecutor to divulge names of his witnesses or the nature of his physical or documentary evidence.¹² N. C. Gen. Stat. § 15-143 (1965); *State v. Spence*, 271 N. C. 23, 32, 155 S. E. 2d 802, 809 (1967).¹³

¹¹ The celebrated opinions in *State v. Tune*, 13 N. J. 203, 98 A. 2d 881 (1953), contain a vigorous dissent by Justice (now MR. JUSTICE) BRENNAN who expressed regret over the majority's disregard of the successful implementation of liberal discovery in civil matters.

¹² In another North Carolina retrial situation considered in *State v. Overman*, 269 N. C. 453, 153 S. E. 2d 44 (1967), an accused rapist's pretrial request for details concerning the evidence to be presented against him was denied on the ground that he could simply study a transcript of his prior acquittal of a kidnaping charge arising out of the same transaction.

¹³ The most comprehensive and recent statement of criminal discovery in North Carolina is A Look At North Carolina's Criminal Discovery System Prepared for North Carolina Governor's Committee on Law and Order, Task Force on Arrest and Apprehension, A. Pye, Chmn. (1970): "Very little use is being made of the new (1967) criminal discovery statute (G. S. 15-155) which is resulting in a paucity of cases dealing with the extent to which it allows discovery. It is unclear whether the attorneys are not aware of

Thus, it is not surprising that Britt's investigative and preparatory resources were puny in contrast to those employed by his accusers. The local police were able to enlist the talent of the State Bureau of Investigation to trace and analyze fingerprint evidence. Investigators were able to study the situs of the murder. At their convenience officers were able to interrogate the incarcerated defendant, eventually eliciting from him an incriminating statement. After the mistrial the prosecutor, unlike Britt's lawyer, had access to a transcript to readjust his trial strategy.

This Court has been sensitive to the persuasive arguments for more liberal rules of criminal discovery.¹⁴ To

the statute or whether they feel that there is little use in filing a motion under it. . . . Indications are that both these reasons have vitality," *id.*, at 14-15. It continues:

"There is a strong possibility that solicitors (consciously or unconsciously) withhold evidence favorable to the defendant. . . ." *Id.*, at 16.

In addition to the discussion of such procedures in *State v. Goldberg*, 261 N. C. 181, 134 S. E. 2d 334 (1964), see *State v. Hamilton*, 264 N. C. 277, 141 S. E. 2d 506 (1965) (access to police reports and notes denied); *State v. Overman*, 269 N. C. 453, 468, 153 S. E. 2d 44, 57 (1967); see also *Goldman v. United States*, 316 U. S. 129 (1942), cited with approval in *Goldberg*, *supra*, at 191, 134 S. E. 2d, at 341, holding that a defendant has no right to inspect memoranda used by prosecution witnesses to refresh their memories. See generally the restatement of the common-law rules of discovery, cited by the *Goldberg* court, *supra*, at 191, 134 S. E. 2d, at 340, in 23 C. J. S., Criminal Law §§ 955 (1) and (2).

¹⁴ See *Pyle v. Kansas*, 317 U. S. 213 (1942); *Jencks v. United States*, 353 U. S. 657, 668 (1957); *Brady v. Maryland*, 373 U. S. 83 (1963). In *Dennis v. United States*, 384 U. S. 855, 873 (1966), we required a trial court to allow inspection by a defendant of grand jury minutes, reasoning that: "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact."

the extent that a State permits criminal discovery by its accused, it is our duty to forbid distribution of its fruits according to formulas based on wealth, which, like race, is a suspect classification. *Griffin v. Illinois, supra*; *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Shapiro v. Thompson*, 394 U. S. 618 (1969).

The provision in North Carolina permitting defendants to purchase mistrial minutes is obviously an important exception to the common-law prohibition. A mistrial transcript contains not only prosecution witnesses' names and addresses but their stories under oath and it contains the entire theory of the government's case. Such a document is a complete dossier of the opposing case for which even the most liberalized rules of civil discovery have no equivalent. While this exception endures, the State may not condition its availability upon financial considerations which effectively deprive the poor of this valuable tool.

III

The lower court's opinion suggests that whatever legitimate uses generally might be made of mistrial minutes could alternatively be accomplished by counsel's calling as a witness the court reporter of the previous prosecution. See also *Nickens v. United States*, 116 U. S. App. D. C., at 341, 323 F. 2d, at 811. However satisfactorily that suggestion might facilitate impeachment of government witnesses, it should be clear that the procedure would provide no assistance in preparing counsel for trial.

Moreover, the procedure of calling a court reporter to verify hostile witnesses' contradictions has been discredited by trial commentators, including Professor Robert Keeton:

"If you have caught the witness in a contradiction,

it is the more clearly shown if the exact words previously used by the witness are brought to the jury's attention. The effect may extend beyond the bearing of the contradiction on its own subject matter, for the witness may be 'broken down' so that he makes other admissions or the jury disbelieves other parts of his testimony. *Calling upon the reporter to read such prior testimony during the examination, however, is rarely a practicable method of confronting the witness with such contradiction.* Many trial judges will decline to permit the practice because of the great delay usually involved, while the reporter is seaching through his notes in an effort to find the part of the testimony to which you refer. Even if the judge will permit the practice, the wisdom of its use is questionable. The jury and court may grow impatient, and the witness will have been afforded a considerable period of time to think about the matter and be prepared with an explanation or excuse." R. Keeton, *Trial Tactics and Methods* 103 (1954). (Emphasis added.)

Indeed these hazards were painfully present in *United States ex rel. Wilson v. McMann, supra*, in which Wilson's attorney erroneously believed he remembered an inconsistent statement of a prosecution witness who had testified at the prior mistrial. At the second trial the lawyer quizzed the witness concerning this prior remark but the witness denied having ever made it. The judge decided to delay the trial until the reporter of the mistrial could read back the precise words used by the witness. After "considerable delay and perhaps some inconvenience to the jurors" counsel learned that he had been mistaken and that no contradiction, at least on the suspected issue, had existed. *Id.*, at 898.

I am not satisfied that the procedure afforded paupers by the *Nickens* majority is a reasonable substitute for full access to a mistrial transcript. Accordingly, I would hold under the *Griffin-Roberts-Wilson* line of authority that Britt has been denied equal protection of the laws.¹⁵

I would reverse the judgment below.

¹⁵ The majority does not disagree that under ordinary circumstances Britt would have been denied equal protection of the laws. The majority, however, distinguishes Britt's case from the routine case because he was tried in a small town where defense counsel was well acquainted with the court reporter. Counsel, reasons the Court, ought to have prevailed upon the reporter between trials to assist in his making notes of the first trial. I believe that these kinds of fortuities ought not to be determinative of constitutional guarantees, especially where it may be difficult afterwards to establish the nature of such alleged relationships.